Supreme Court, U.S.
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No. 08-525

IN THE
Supreme Court of the United States

JONATHAN L. HAAS,
Petitioner,

v.

JAMES B. PEAKE, M.D., Secretary of Veterans Affairs,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Veterans are entitled to benefits for disabilities connected with their military service. The Agent Orange Act of 1991, as amended, requires a finding of service connection for specified diseases "manifest . . . in a veteran who, during active military, *naval,* or air service, *served in the Republic of Vietnam* during the period beginning on January 9, 1962 and ending on May 7, 1975." 38 U.S.C. § 1116(a)(1)(A) (emphasis added).

Does this statute exclude veterans who performed naval service in the territorial seas of the Republic of Vietnam?

PARTIES TO THE PROCEEDING

There are no parties other than those listed in the caption.

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IN THE

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JAMES B. PEAKE, M.D., Secretary of Veterans Affairs,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is reported at 525 F.3d 1168 (Fed. Cir. 2008) and reproduced in Petitioner's Appendix ("App.") at 1a. The supplemental opinion of the court of appeals is designated for publication, although not yet published, and is reproduced at App. 63a. The decision of the United States Court of Appeals for Veterans Claims is reported at 20 Vet. App. 257 and reproduced at App. 71a. The decisions of the Board of Veterans' Appeals and the Regional Office of the Department of Veterans Affairs

("Department" or "DVA") are reproduced at App. 114a and 127a respectively.

JURISDICTION

The judgment of the Federal Circuit issued on May 8, 2008 and the order denying petition for rehearing issued on October 9, 2008. This petition is timely filed within 90 days of the Federal Circuit's denial of rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1). The courts below had jurisdiction pursuant to 38 U.S.C. § 7292(c) and 28 U.S.C. § 1295(a)(3).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the original and amended Agent Orange Act of 1991, codified (as amended) at 38 U.S.C. § 1116, are reproduced at App. 138a and 161a. The relevant regulations of the Department of Veterans Affairs are reproduced at App. 166a, 172a, 186a, 196a.

STATEMENT OF THE CASE

This case presents a question within the Federal Circuit's exclusive jurisdiction that has extraordinary importance for Navy veterans. In the Agent Orange Act of 1991, as amended, Congress required a finding of service connection for specified diseases "manifest . . . in a veteran who, during active military, *naval,* or air service, *served in the Republic of Vietnam* during the period beginning on January 9, 1962 and ending on May 7, 1975." 38 U.S.C. § 1116(a)(1)(A) (emphasis added). The Federal Circuit, siding with the Department of Veterans Affairs, has interpreted Section 1116 contrary to its plain language to apply not to all naval service in the Republic of Vietnam, but only to service on land or in the inland waterways. The Federal Circuit has imputed to Congress an intent to

deny statutory protection to more than 800,000 "blue-water" Navy veterans who served in the Republic's territorial seas and coastal waters, even though such veterans had the highest incidence of the covered disease non-Hodgkins lymphoma (NHL), and even though the Act's sponsors declared that it would codify an existing NHL regulation that protected such veterans. Finally, in conflict with *Brown v. Gardner*, 513 U.S. 115, 118 (1994), the Federal Circuit improperly awarded deference under *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), to the Department before applying the canon that interpretive ambiguity in the statute must be resolved in the veteran's favor. This Court's review is imperative.

A. Vietnam War Background

1. *The Formation of the Republic of Vietnam.* In May, 1954, the communist Viet Minh nationalist movement routed French forces and effectively ended French colonial rule of Vietnam. The major powers brokered a solution that reflected Cold War divisions. The Geneva Convention of 1954 partitioned Vietnam into two countries at the 17th parallel: the Republic of Vietnam to the south (colloquially known as South Vietnam), and the Democratic Republic of Vietnam in the north (colloquially known as North Vietnam). App. 81a n.3. The ceasefire limited the Viet Minh to North Vietnam. Marilyn Young, *The Vietnam Wars 1945 to 1990* 41 (1991).

2. *American Military Involvement in Vietnam.* The newly partitioned Vietnam quickly became a front in the Cold War. The U.S.-backed government in the Republic of Vietnam soon faced extensive communist insurgencies. The U.S. began committing military forces to Vietnam in 1961 in what is known as the Vietnam "advisory" period.

The U.S. Navy focused much of its effort on coastal sea patrol to prevent communist infiltration. The Republic of Vietnam had a very long coastline, extending approximately 1200 miles from the 17th parallel to the Cambodian border. II Edward J. Marolda & Oscar P. Fitzgerald, *The U.S. Navy and the Vietnam Conflict* 155 (1986). This long coastline, with its many inlets, shallow shores, natural harbors and large number of islands, created a logistical nightmare for patrolling and counterinsurgency efforts during the 1960s. *Id.* at 154-56, 340. By May 1961, U.S. Naval forces begin patrolling the coast waters from the Cambodian border to the mouth of the Mekong River Delta. By the end of 1961, the U.S. Navy was conducting significant coastal patrols along and below the 17th parallel while air patrol monitored the waters east of this coastal sea patrol. The U.S. Navy increased its steaming miles per month from 10,000 in May 1961 to 37,000 in May 1962 and extended sea patrol to the Mekong Delta and the Cambodian border in an effort to counter the Communist infiltration threat from Cambodia. *Id.* at 172-73, 76. Naval forces in the coastal seas were known as the "blue-water" Navy, in contrast to the "brown-water" Navy that operated in Vietnam's inland waters.

The U.S. Navy's engagement in Vietnam only intensified after war was declared in Vietnam in 1964 and escalated thereafter. The blue-water Navy continued to provide extensive coastal patrols as well as full scale combat and combat-support operations throughout the war. *Id.* at 315, 325, 355-56, 452. U.S. Naval forces providing close gunfire support to army and marines on the beach, performing supply functions, or interdicting enemy boats would com-

monly come within a few thousand yards of shore. *Id.* at 288-89, 311, 315, 355-56, 463.

3. *Agent Orange.* Because of its warm, rainy climate, Vietnam is covered by dense forests in both inland and coastal areas. The foliage created military havoc by obscuring insurgent movements. Starting in 1962, the U.S. armed forces began spraying an herbicide containing the chemical dioxin. *Report to the Secretary of Veterans Affairs on the Association Between Adverse Health Effects and Exposure to Agent Orange, reprinted in* Links Between Agent Orange, Herbicides, and Rare Diseases: Hearing before the Human Resources and Intergovernmental Relations Subcomm. of the Comm. on Gov't Operations, 101st Cong., 2d Sess., 23-24 (1990) ("Zumwalt Report"). Troops called this herbicide "Agent Orange" because of its orange packaging. The U.S. sprayed Agent Orange in its undiluted form, six to twenty-five times the manufacturer's suggested rate, and sprayed at a rate of three gallons per acre. *Id.* at 24.

Forested coastal lands were heavily contested areas between the U.S. and the southern guerilla insurgencies, and were accordingly subject to constant spray missions. Young at 185; Jeanne Mager Stellman et al., *A Geographic Information System for Characterizing Exposure to Agent Orange and Other Herbicides in Vietnam*, 111 Env't Health Perspectives 321, 325-26 (Figure 5) (2003). Density maps show that the U.S. concentrated the spraying of Agent Orange on the far eastern coastal areas and the western mountain range border with Laos. Further south, the III and IV Corps tactical zones were heavily sprayed, especially around the coastal inlet areas and entrances to the Mekong River. *Id.*

Concerns regarding the toxicity of Agent Orange to humans began to surface in 1968, as scientists linked dioxin to a potential increase in birth defects and deformities. Zumwalt Report at 26-27. The Department of Defense phased out the use of Agent Orange by 1971. App. 2a.

B. Legislative and Regulatory Background

1. Dioxin Act

In the 1970's and 1980's, scientific evidence began to link dioxin to various diseases, including cancer. Zumwalt Report at 28. As Congress tackled the question of disability benefits for veterans, it confronted substantial difficulties in defining workable compensation rules. It was practically impossible to require Vietnam veterans to prove actual exposure to dioxin. Records of the location and time of troop movements and Agent Orange spraying were erratically created and frequently destroyed or lost. *Id.* at 70. The Centers for Disease Control ("CDC"), which had been commissioned by Congress to undertake a study of the health effects of Agent Orange, concluded that it was impossible from service records to determine who had been exposed and who had not been exposed. App. 13a. The CDC also concluded that blood and tissue testing could not determine exposure. App. 14a. Furthermore, the mechanisms of dioxin exposure were not well understood. In addition to direct contact at a spray site, there were a number of plausible pathways of exposure. There was substantial risk of "surface runoff" contamination: namely, that dioxin, like all toxic chemicals sprayed aerially, would leech underground or be carried by Vietnam's heavy rainfall and contaminate the inland and coastal waters of

Vietnam. Dioxin could then enter the food and drinking-water supply through contaminated lands and waters. Zumwalt Report at 70.[1] Moreover, toxic chemicals aerially sprayed over land will be carried by the wind (including coastal spraying that is blown out to sea). This "wind drift" can lead to chemicals traveling great distances. *Id.* Finally, the dosage of dioxin exposure appeared to be very small; some immunologists of the time believed that exposure to even a single molecule could catalyze disease processes in some individuals. *Id.* at 67-68.

1. *Dioxin Act.* In 1984, Congress passed the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725, 2729 (1984) (the "Dioxin Act"). Congress declared that there was emerging "evidence that chloracne, porphyria cutanea tarda, and soft tissue sarcoma are associated with exposure to certain levels of dioxin as found in some herbicides[.]" *Id.* § 2(5). Congress directed the Department (then named the Veterans Administration) to "establish guidelines and (where appropriate) standards and criteria for resolution of claims . . . where the criteria for eligibility for a benefit include a requirement that a death or disability be service connected and the claim of service connection is based on a veteran's exposure during service . . . in

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[1] A recent study found that Australian blue-water navy veterans were exposed to concentrated dioxin through distillation tanks that converted seawater to drinking water. Nat'l Research Ctr. for Envtl. Toxicology, Queensland Health Scientific Servs., *Examination of the Potential Exposure of Royal Australian Navy (RAN) Personnel to Polychlorinated Dibenzodioxins and Polychlorinated Dibenzofurans via Drinking Water* (Dec. 12, 2002).

the Republic of Vietnam during the Vietnam era to a herbicide containing dioxin." *Id.* § 5(1), (1)(A).

2. *Regulation 311.* Reacting to the congressional directive, the Department promulgated a regulation to govern disability awards for chloracne in 1985. The regulation presumed service connection if the veteran served "in the Republic of Vietnam," defined to include "service in the waters offshore and service in other locations, if the conditions of service involved duty or visitation in the Republic of Vietnam." 38 C.F.R. § 3.311a(a)(1) (1986). The Department explained its rule and its "longstanding policy of presuming dioxin exposure in the cases of veterans who served in the Republic of Vietnam" as being grounded in "the many uncertainties associated with herbicide spraying during that period[.]" Adjudication of Claims Based on Exposure to Dioxin or Ionizing Radiation, 50 Fed. Reg. 34,454, 34,454-55 (Aug. 26, 1985) (to be codified at 38 C.F.R. pts. 1 & 3).

3. *Regulation 313.* Shortly thereafter, the Department addressed service connection for NHL. The CDC had conducted a study concluding that Vietnam veterans had a roughly 50% increased risk of developing NHL 15 to 25 years after military service in Vietnam as compared to other men in the United States. Moreover, veterans in the blue-water Navy had a higher risk of developing NHL than their counterparts who served in the brown-water Navy, or on the ground in Vietnam: "[r]elative to other Vietnam veterans, the risk for NHL tended to be highest among men who (1) served in I Corps or the blue-water Navy, (2) were stationed in Vietnam for 1.5 to 1.9 years, and (3) were officers." Centers for Disease Control, *Final Report of the Association of Selected Cancers with Service in the U.S. Military in*

Vietnam 37 (Sept. 1990). Significantly, the CDC concluded that NHL was correlated with Vietnam service but not dioxin exposure, a conclusion that the Department accepted. *See* Claims Based on Service in Vietnam, 55 Fed. Reg. 43,123, 43,124 (Oct. 26, 1990) (to be codified at 38 C.F.R. pts. 3 & 4), 43,124 Claims Based on Exposure to Herbicides Containing Dioxin Soft Tissue Sarcomas, 56 Fed. Reg. 51,651, 51,651 (Oct. 15, 1991) (to be codified at 38 C.F.R. pts. 3 & 4).

Accordingly, in 1991, the Department promulgated Regulation 313, which recognized service connection for NHL for all Vietnam veterans. 38 C.F.R. § 3.313 (1991). That regulation tracked the language of Regulation 311, with minor variation. It provides:

> (a) *Service in Vietnam. Service in Vietnam* includes service in waters offshore, or service in other locations if the conditions of service involved duty or visitation in Vietnam.
>
> (b) *Service connection based on service in Vietnam.* Service in Vietnam during the Vietnam Era together with development of non-Hodgkin's lymphoma manifested subsequent to such service is sufficient to establish service connection for that disease.

4. *Proposed Soft-Tissue Sarcoma Rule.* Prior to Regulation 313, the Department had afforded a presumption of service connection based on Vietnam service only for chloracne, as noted above. Veterans challenged in court the narrow standard that the Department had applied under the Dioxin Act in determining what diseases should be afforded a service-connection presumption of exposure to harmful herbicides. The district court ruled in the veter-

ans' favor, holding that "[t]he Administrator both imposed an impermissibly demanding test for granting service connection for various diseases *and* refused to give veterans the benefit of the doubt in meeting that demanding standard." *Nehmer v. U.S. Veterans' Admin.*, 712 F. Supp. 1404, 1423 (N.D. Cal. 1989). In response to *Nehmer*, the Department proposed to modify Regulation 311 to include soft-tissue sarcomas. 38 C.F.R. § 3.311a(c)(2) (1991); Claims Based on Exposure to Herbicides Containing Dioxin Soft Tissue Sarcomas, 56 Fed. Reg. 51,651, 51,652 (October 15, 1991) (to be codified at 38 C.F.R. pts. 3 & 4).

2. The Agent Orange Act of 1991.

1. *Codification of Regulatory Provisions.* In the meantime, Congress had begun to consider a more comprehensive framework for Vietnam-related disability claims. In 1991, Congress passed the Agent Orange Act of 1991, Pub. L. No. 102-4, 105 Stat. 11, which relieved the Department of its regulatory discretion with regard to these three diseases by codifying the presumption of service connection. The Act specified that when one of the three disease classes – NHL, soft-tissue sarcomas, and chloracne – manifested "in a veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the Vietnam era," the disease would be considered to have been incurred in or aggravated by such service. Pub. L. No. 102-4, § 2(a)(1), 105 Stat. 11 (1991) (codified, as amended, at 38 U.S.C. § 1116(a)(1)).[2]

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[2] Section 1116(a) was amended in 1996 to require that the service in the Republic of Vietnam occurred "during the period beginning on January 9, 1962 and ending on May 7, 1975."

Addressing the definition of service "in the Republic of Vietnam," the sponsor of the bill that became the Agent Orange Act declared that the Act "would codify the presumptions of service connection that have been administratively provided for chlora[cn]e, non-[H]odgkin's lymphoma, and soft-tissue sarcomas . . ." 137 Cong. Rec. E203-01 (daily ed. January 17, 1991) (statement of Rep. Montgomery). Other legislators and the first President Bush made statements to the same effect.[3]

Congress did not intend to limit the presumption of service connection to these three diseases. The Agent Orange Act also directed the Department to identify other diseases for a "positive association" with the "exposure of humans to a herbicide agent" and to prescribe regulations "providing that a presumption of service connection is warranted for that disease[.]" Pub. L. No. 102-4 at § 2(b)(1), 105 Stat. at 12. (codified, as amended, at 38 U.S.C. § 1116(b)(1)). To accomplish its compensatory goal, Congress directed the creation of a tissue-sample archiving system, *see id.* at § 7, 105 Stat. at 16-17, so that further studies on the "health hazards resulting from exposure to dioxin" and the "health hazards resulting from exposure to other toxic agents in the herbicides used

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Veterans' Benefits Improvement Act of 1996, Pub. L. No. 104-275 § 505(b), 110 Stat. 3322, 3342 (1996).

[3] *See also*, 137 Cong. Rec. H719-01, 722 (daily ed. Jan. 29, 1991) (statement of Rep. Stump); 137 Cong. Rec. E390 (daily ed. Jan. 29, 1991) (statement of Rep. Burton); Statement of President George Bush Upon Signing H.R. No. 556 (Feb. 6, 1991), *reprinted in* 1991 U.S.C.C.A.N. 11 (stating that the Agent Orange Act "will codify decisions previously made by my Administration with respect to presumptions of service connection").

in the support of United States and allied military operations in the Republic of Vietnam" could be completed and additional diseases and disabilities identified for coverage. *Id.* at § 8, 105 Stat. at 17.

2. The Department's Regulatory Implementation of Section 1116. Shortly after the passing of the Agent Orange Act, the Department interpreted the "served in the Republic of Vietnam" requirement for coverage. The Department amended its adjudication manual to adopt a rule consistent with the broad phrasing of the statute:

> It may be necessary to determine if a veteran had 'service in Vietnam' in connection with claims for service connection for non-Hodgkins lymphoma, soft-tissue sarcoma, and chloracne. *In the absence of contradictory evidence, 'service in Vietnam' will be conceded if the records shows that the veteran received the Vietnam Service Medal.*"

VA Adjudication Procedures Manual M21-1 ¶ 4.08(k)(1) (November 8, 1991) (internal citation omitted, emphasis added). Blue-water Navy veterans were eligible for (and did receive) the Vietnam Service Medal. Dep't of Def. Manual of Military Decoration and Awards, ¶ C6.6 (September 1996). The Department drew no distinctions in applying the "served in the Republic of Vietnam" test for Regulations 311 and 313.

3. In 1993, the Department promulgated a general implementing regulation for the Agent Orange Act. In that regulation, the Department defined service in the Republic of Vietnam in language that tracked Regulations 311 and 313, albeit with slightly different punctuation: "'Service in the Republic of Vietnam'

includes service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam." 38 C.F.R. § 3.307(a)(6)(iii) (1994). This test applied to all the covered Section 1116 diseases, including NHL. 38 C.F.R. § 3.309(e). The Department continued to award disability benefits to blue-water Navy veterans under this regulation. Ct. App. JA . 708-716 (awarding benefits in 1995, 1996, and 1997).

4. In subsequent years, Congress amended the Agent Orange Act to codify mandatory service connection for a number of diseases (including type 2 diabetes). There are now eight disease categories entitled to a mandatory statutory presumption of service connection. 38 U.S.C. § 1116(a)(2).

As the number of diseases for which service-connection would be presumed grew (and thus the costs of coverage grew), the Department began to suggest a narrower definition of the statutory phrase "in the Republic of Vietnam." In a General Counsel opinion issued in 1997 on pension benefits, the Department construed the phrase "served in the "Republic of Vietnam" as used in 38 U.S.C. § 101(29)(A) not to apply to service members whose service was on ships in the waters off the coast of Vietnam. In dicta, the General Counsel suggested that the same term in the Agent Orange Act, while not necessarily having the same meaning, likewise did not cover offshore service. Dep't. of Veterans Affairs, Op. Gen Counsel Prec. 27-97 (1997). Similarly, the Department's response to comments in 2001 diabetes rulemakings stated that service in the "Republic of Vietnam" meant service on land or in inland waterways. Disease Associated With Exposure to Certain Herbricide Agents: Type 2 Diabetes,

66 Fed. Reg. 23,166 (May 8, 2001) (to be codified at 38 C.F.R. pt. 3).

In early 2002, the Department amended the language of its Manual M21-1, abandoning its Vietnam Service Medal test for determining Vietnam-service eligibility and construing 38 C.F.R. § 3.307(a)(6) as requiring a veteran to show that he "actually served on land within the Republic of Vietnam" before the presumption of exposure to herbicides vests. Nonetheless, the Department in binding adjudications continued to award benefits to blue-water Navy veterans. *See, e.g.*, Bd. of Veteran Appeals ("BVA") Decision, Docket No. 02-22 228 (Feb. 2, 2004) *available at* http://www.va.gov/vetapp04/files/0402924.txt; BVA Decision, Docket No. 95-30 437 (July 23, 2002) *available at* http://www.va.gov/vetapp02/files02/0208230.txt.

The Department also advanced its "boots-on-land" interpretation in various proposed rules. In 2004, the Department proposed a rule (which never became final), "to make it clear that veterans who served in waters offshore but did not enter Vietnam, either on its land mass or in its inland waterways cannot benefit from" the presumed exposure to herbicides. Presumptions of Service Connection for Certain Disabilities and Related Matters, 69 Fed. Reg. 44,614, 44,620 (July 27, 2004) (to be codified at 38 C.F.R. at pts. 3 & 5). Similarly, in April of this year, in response to the adverse CAVC decision in this case, the Department again proposed a rule to amend its adjudication regulation to "clarify" that "service in the Republic of Vietnam for the purposes of applying the presumption of exposure to herbicide agents includes service on land on an inland waterways in Vietnam." Definition of Service in the Republic of

Vietnam, 73 Fed. Reg. 20,566 (April 16, 2008)(to be codified at 38 C.F.R. pt. 3).

C. Proceedings Below.

1. *Petitioner's Claim for Benefits.* Petitioner is Commander Jonathan L. Haas, USN, Retired. He served in the U.S. Navy from September 1959 to September 1960 on active duty and subsequently from May 1963 to June 1970, and was awarded four Vietnam Service Medals. Cdr. Haas served on the U.S.S. Mount Katmai, an ammunition supply ship that operated off the coast of Vietnam. Because of its highly explosive cargo, the ship never visited any ports.

Twelve years after the end of his service in Vietnam, Cdr. Haas was diagnosed with type 2 diabetes, an illness that has been linked to Agent Orange. In August of 2001, he applied to the Department of Veterans Affairs for disability for type 2 diabetes, peripheral neuropathy and loss of eyesight.

Cdr. Haas recalled large, billowing clouds of Agent Orange drift from coastal spraying and engulf his ship at the peak of U.S. use of Agent Orange in 1968. He specifically stated that "each morning we'd run up and down the coastline to replenish the ships. . . . if they were spraying that morning, then we'd get caught in the fog." Record on Appeal ("ROA") 563. He further testified:

> Our ship did go within 100 feet of the coast of Vietnam. And most of our rearming and replenishing of ships was done in the early morning hours and this was the same time that Agent Orange and other defoliants [were] sprayed on the coastal forests. You could see the large clouds of chemicals being dropped by the aircraft

> which they sprayed over the forest and these large clouds would drift out over the water because of the prevailing winds and they would engulf the ships, my ship in particular. Now, you could see the chemicals, you could taste them, smell them and they landed on your skin.

ROA 562.

2. The Regional Office denied Cdr. Haas the presumption of a service connection and the Board of Veterans Appeals affirmed. The Board ruled that Cdr. Haas was not entitled to the statutory presumption for those who served "in the Republic of Vietnam" because he had never "set foot on land in the Republic of Vietnam" as the Board believed 38 C.F.R. § 3.307(a)(6)(iii) required. App. 117a-122a.

3. The CAVC reversed the Board of Veterans' Appeals. The court concluded that the Board's and the Department's interpretation of § 3.307(a)(6)(iii) was "plainly erroneous" and that the regulation "must be read to include at least service of the nature described by the appellant, that is, service in the waters near the shore of Vietnam." App. 101a. The court reasoned that

> given the spraying of Agent Orange along the coastline and the wind borne effects of such spraying, it appears that these veterans serving on vessels in close proximity to land would have the same risk of exposure to the herbicide Agent Orange as veterans serving on adjacent land, or an even greater risk than that borne by those veterans who may have visited and set foot on the land of the Republic of Vietnam only briefly.

Id. at 100a.

4. On the Department's appeal, a divided panel of the Federal Circuit reversed. The majority concluded that Section 1116 was ambiguous; that the Department's narrow interpretation of § 3.307(a)(6)(iii); and hence the Agent Orange Act was entitled to deference; and accordingly, that Cdr. Haas did not serve in the Republic of Vietnam within the meaning of the statute. App. 28a, 151a, 56a-59a. Judge Fogel dissented. He concluded that the majority's analysis was "inconsistent with the intent of the statute" and was thus "based upon an unreasonable interpretation of the subject regulation." *Id.* at 56a. "Congress was seeking to make it easier, not more difficult, for Vietnam veterans to assert claims arising from exposure to Agent Orange[,]" he reasoned. *Id.* at 58a.

Cdr. Haas sought and was denied rehearing. *Id.* at 65a-70a. Judge Fogel again dissented from the denial of panel rehearing and recommended *en banc* review. *Id.* at 70a. The Federal Circuit denied rehearing *en banc*.

REASONS FOR GRANTING THE PETITION

The decision below cannot stand. In accepting the Department's construction of 38 U.S.C. § 1116, the court below disregarded the plain meaning of the term "Republic of Vietnam" as encompassing that nation's territorial seas. The court's categorical exclusion of blue-water Navy veterans from the statute's protection defies the Congressional intent to codify a regulation presuming service connection that was based on a finding of excess disease among that very class of veterans. Furthermore, the Federal Circuit granted *Chevron* deference to the starkly unreasonable interpretation of the Department without first applying the canon requiring statutory ambiguity to be resolved in favor of the veteran, in

direct conflict with the rule of *Brown v. Gardner*, 513 U.S. 115, 118 (1994). Because this question is critically important – affecting benefits to large numbers of the estimated 832,000 "blue water" Vietnam veterans (*see Ribaudo v. Nicholson*, 21 Vet. App. 137, 144 (2007)) – and because the decision below conflicts with this Court's precedent, the petition should be granted.

I. THIS COURT SHOULD GRANT REVIEW TO DETERMINE THE MEANING OF A CRITICAL VETERANS BENEFITS STATUTE.

A. The Term "The Republic Of Vietnam" Refers To The Sovereign Nation Whose Boundaries Include The Territorial Seas.

No deference is ever paid to an agency interpretation if Congress has "directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842 (1984). Congress has so spoken here.

1. The term "served in the Republic of Vietnam" in Section 1116(a)(1)(A) is plain. There is no dispute that "Republic of Vietnam" refers to the sovereign nation colloquially known as South Vietnam. Therefore, a veteran has "served in the Republic of Vietnam" if he served in the territory of that sovereign state. It is well established that "[t]he territory of a state consists of (a) its land area; (b) its internal waters and their beds; (c) *its territorial sea* and the bed of the territorial sea; and (d) the subsoil under, and ... the air space above, (a), (b), and (c)." *Restatement (Second) of Foreign Relations Law* § 11 (1965) ("*Restatement*") (emphasis added); *Louisiana*

v. Mississippi, 202 U.S. 1, 52 (1906) (territorial seas are "the minimum limit of the territorial jurisdiction of a nation"). In the Agent Orange Act of 1991, Congress clearly would have understood the Republic of Vietnam's territory to encompass its territorial seas. The Federal Circuit had no basis to rewrite the unqualified term "in the Republic of Vietnam" to mean "on the land or inland waterways of the Republic of Vietnam."[4]

The Federal Circuit nonetheless found that the statutory term was ambiguous because there were "competing methods" identified by the CAVC that purportedly "define sovereign nations" to "includ[e] only the nation's landmass." App. 28a [Opp.26]. But the only authority cited for the proposition that a sovereign nation's "boundaries can be defined solely by the mainland geographic area" is an online CIA factbook describing the "land boundaries" of the *current* Communist Republic of Vietnam as 4,639 km long. App. 81a.

Aside from the irrelevance of this source for divining Congress's intent in the 1991 Act regarding the now-defunct Republic of Vietnam, the CIA factbook does *not* purport to describe the boundaries of a sovereign nation as simply its landmass. The term "land boundaries" is a defined term referring only to a country's *internal* land borders with "con-

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[4] *Accord* United Nations Convention on the Law of the Sea, Dec. 10, 1982, Part II, Art. 2(1) (1982) ("The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea."); Presidential Proclamation 5928, Territorial Sea of the United States of America, 54 Fed. Reg. 777 (Dec. 27, 1988) (same).

tiguous border countries." CIA World Factbook (definitions), *available at* https://www.cia.gov/library/publications/the-world-factbook/docs/notesanddefs.html). The "land boundaries" of a country do not include "coastlines," which are separately reported, precisely because no one considers the coastline a "boundary" of a sovereign nation's territory.[5]

The CAVC also found ambiguity in the term "Republic of Vietnam" because it might refer to a 200 mile exclusive economic zone. App. 81a. But Section 1116 addresses the service member's presence in a sovereign nation's territory, and has nothing to do with rights of natural resource exploitation. The CAVC also noted that Vietnam claims certain "surrounding islands in the Hoang Sa and Truong Sa archipelagos." App. 81a. But sovereignty over coastal islands only affects where the baseline for the territorial sea is drawn. *Restatement* § 14 . It does not cast doubt on whether the term "Republic of Vietnam" refers to the entire sovereign territory, rather than just part of it. Even if those islands were Vietnamese territory that would only mean that the Republic of Vietnam would encompass the islands and their archipelagic seas *in addition* to the territorial seas off its mainland. *See supra* n.4. Critically, either alternative (if deemed a plausible interpretation of Section 1116) encompasses the territorial seas,

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[5] *See id.* (Vietnam), *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/vm.html (last visited October 14, 2008) (reporting the "land boundaries" of Vietnam as "4639 km", consisting of "Cambodia 1,228 km, China 1,281 km, Laos 2,130 km," and separately reporting its coastline of 3,444 km); *see id.* (United States) (reporting the "land boundaries" of the United States as "12,034 km," consisting of "Canada 8,893 km (including 2,477 km with Alaska), Mexico 3,141 km," and separately reporting its coastline of 19,224 km).

and would create service-connection for veterans who served in those seas. No plausible construction of the term makes the statute ambiguous as to whether it excludes territorial seas and is limited to the geographic mainland.

2. When Petitioner informed the Federal Circuit of this error in his rehearing petition, the court issued a supplemental opinion to buttress its finding of ambiguity. The court posited that references to a sovereign nation are inherently ambiguous because Congress sometimes uses special definitions. App. 69a-70a. Its analysis does not withstand scrutiny.

First, the court of appeals purported to rely on immigration cases. App. 69a. But (except for one erroneous decision) those cases do not claim that the territorial seas are excluded from the term "United States" for purposes of immigration statutes.[6] Rather, they hold that (in context) the statutory requirement of "entry" into the United States is not satisfied by mere "physical presence" in the United States territory because "United States immigration law is designed to regulate the travel of human beings, whose habitat is land, not the comings and goings of fish or birds." *See Zhang v. Slattery*, 55 F.3d 732, 754 (2d Cir. 1995); *see also Leng May Ma v. Barber*, 357 U.S. 185, 188 (1958).

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[6] *Yang v. Mauqans*, 68 F.3d 1540, 1548 (3d Cir. 1995), does so hold, but its reading of the definition of "United States" in the Immigration and Nationality Act as implicitly excluding the territorial seas is questionable. For example, the provision requiring vessels "arriving in the United States" to detain alien crewmen, 8 U.S.C. § 1284, would make no sense if it did not refer to the territorial seas.

Second, the Federal Circuit points to special statutory definitions of sovereigns, such as the provision governing taxation of continental shelf activities that specially defines "United States" for that purpose to include the "subsoil of those submarine areas which are adjacent to the territorial waters of the United States." 26 U.S.C. § 638(1). But "Republic of Vietnam" in Section 1116 is an *undefined* statutory term, and thus has its ordinary meaning. *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995). Congress often uses special definitions when it departs from ordinary meaning. For example, Congress has sometimes defined the term "State" to include Wake Island and the Canal Zone, 29 U.S.C. § 1002(10) (ERISA), but such usage creates no ambiguity as to whether the undefined term "State" in a different statute would include those jurisdictions. So too here Congress's use of special sovereign definitions in other statutes does not warrant a judicial rewrite of the statutory term "Republic of Vietnam."

Finally, the Federal Circuit points to veterans statutes that define service by reference to a country and the waters "adjacent" thereto. App. 69a-70a. But "adjacent" waters is a different concept from territorial waters, and would not be inherent in a reference to a sovereign nation. Indeed, in designating the Vietnam combat zone for purposes of the federal income tax, President Johnson defined "the waters adjacent" to Vietnam as extending more than 100 miles offshore. Exec. Order 11216, Designation of Vietnam and Waters Adjacent Thereto as a Combat Zone for the Purposes of Section 112 of the Internal Revenue Code of 1954, 30 Fed. Reg. 5817 (1965). Section 1116 may not reach naval service in all waters adjacent to the Republic of Vietnam, but it

clearly encompasses service in the waters *within* that Republic.

In sum, there is not a *single* authority that defines a sovereign nation solely in terms of the perimeter of its landmass, as the Federal Circuit supposed. There is no ambiguity whatsoever as to whether "naval service" in the "Republic of Vietnam" in Section 1116 includes naval service in its territorial seas.

3. The Federal Circuit's interpretation is also irreconcilable with the rest of Section 1116. For example, a veteran seeking benefits for chloracne or porphyria cutanea tarda must show disease manifestation in a specified period "after the last date on which the veteran performed active military, naval, or air service in the Republic of Vietnam." 38 U.S.C. § 1116(a)(2)(C),(E). The Federal Circuit's "boots-on-land" interpretation puts the veteran to the often impossible task of proving not just when he last served in Vietnam, but when he was last on the mainland or traversing inland waters. Congress did not intend this absurdity.

Nor can that interpretation be squared with Congress's usage of the identical phrase in other parts of the 1991 Act (which is presumed to have the same meaning. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 86 (2006)). Section 6 of the 1991 Act directed the Secretary to collect DVA exam data for use in determining "the association, if any, between the disabilities of veterans referred to in such section and exposure to dioxin or any other toxic substance referred to in such section *or* between such disabilities and active military, naval, or air service in the Republic of Vietnam during the Vietnam era." App. 178a-199a (emphasis added). Pub. L. No. 102-4 at § 6(a), 105 Stat. at 15. Section 7 directed the

Secretary to archive blood and tissue samples of veterans "who performed active military, naval, or air service in the Republic of Vietnam during the Vietnam era." *Id.* § 7(a), 105 Stat. at 16. Section 8 directed the Secretary to investigate the feasibility of further scientific study separately of the "health hazards resulting from exposure to dioxin"; "health hazards resulting from exposure to other toxic agents in herbicides used in support of United States and allied military operations in the Republic of Vietnam during the Vietnam era"; and "health hazards resulting from active military, naval, or air service in the Republic of Vietnam during the Vietnam era." *Id.* § 8(a), 105 Stat. at 17. These provisions collectively show that Congress did not link the concept of "served in the Republic of Vietnam" solely to dioxin exposure. They further underscore the error of an interpretation requiring the Secretary to make individualized inquiries into whether the veteran set foot on land or traversed inland waters in Vietnam in collecting medical exam data, archiving tissues, or designing studies.

Finally, in 1996 Congress amended the general definition of the "Vietnam era" to adopt the same language of "served in the Republic of Vietnam" for the 1961 to 1964 period. *See* 38 U.S.C. § 101(29)(A). This provision governs wartime pension benefits and eligibility for hospital, nursing, and domiciliary care. S. Rep. No. 104-371, at 19-20, *reprinted in*, 1996 U.S.C.C.A.N. 3762, 3770-71 (1996). The Senate Report expressly states that, as in Section 1116, Congress intended to cover "veterans who actually served within the borders of the Republic of Vietnam." *Id.* at 21, 1996 U.S.C.C.A.N. at 3772. As noted above, Vietnam's coastal borders indisputably encompass the territorial seas. The Federal Circuit

impermissibly blessed an unreasoned DVA General Counsel Opinion denying all such benefits to the naval veterans who participated in the extensive coastal patrols, counterinfiltration, and minesweeping operations in that period.[7] *See* App. 42a-43a.

4. Historical context and legislative history must be analyzed in step one of *Chevron*. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987). Here, as noted above, the sponsors of the 1991 Act expressly declared that the Act would codify Regulations 311 and 313. Regulation 313 was predicated on the CDC's finding that NHL was correlated with Vietnam service and not with dioxin exposure, and that blue-water navy veterans had the highest risk of NHL. *Supra* at 8.

In codifying both regulations to require a finding of service connection veterans who "served in the Republic of Vietnam," Congress clearly understood that there were no material differences between the service standards of Regulations 311 and 313, and intended that same unitary standard to apply to each of the three diseases in Section 1116(a)(1)(A). Indeed, from the inception of the Act, the Secretary so interpreted the Act in awarding benefits. *Supra* at 11.

The Federal Circuit concluded otherwise, opining that the 1991 Congress may have (1) understood Regulations 311 and 313 to have different service requirements; (2) understood Regulation 311 to embody a "boots-on-land" requirement, and (3) intended to adopt the "narrower" 311 standard. The Federal

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[7] *See* II Edward J. Marolda & Oscar P. Fitzgerald, *The U.S. Navy and The Vietnam Conflict* 164-188, 219-63, 298-333 (1986).

Circuit thus imputed to Congress the intent to deny a statutory presumption of service connection to blue-water Navy veterans with NHL, even though they were covered under the Secretary's regulation, and even though they were the group that the CDC specifically found had the excess risk of developing NHL. App. 15a-19a, 31a-32a.

The court reached this conclusion based on different punctuation in Regulations 311 and 313. It reasoned that the absence in 311 of "a comma separating the reference to 'service in the waters offshore' and 'service in other locations,' . . . suggested that the requirement of visitation or duty in the Republic of Vietnam applied to both of those forms of extraterritorial service." App. 17a. But statutory analysis "based only on punctuation is necessarily incomplete and runs the risk of distorting a statute's true meaning." *U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454 (1993). The Department placed no such weight on punctuation in the 1993 regulation implementing the 1991 Act: it omitted all commas in defining "service in the Republic of Vietnam" to mean "service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam." 38 C.F.R. § 3.307(a)(6)(iii). If punctuation is to have sway, under the rule of the last antecedent, the phrase "if the conditions of service involved duty or visitation in the Republic of Vietnam" in the 1993 regulation modifies only "service in other locations," and not the phrase "service in the waters offshore." *Anhydrides & Chemicals, Inc. v. United States*, 130 F.3d 1481, 1483 (Fed. Cir. 1997).

In all events, punctuation cannot trump the direct legislative history, and Congress did not intend to exclude from the NHL statutory presumption the very group (offshore Navy veterans) who were found to have excess NHL risk. The Federal Circuit attempted to justify its conclusion by positing that Congress determined that NHL in fact was correlated to dioxin exposure. App. 18a. The court relied on a May, 1990 report from Admiral Zumwalt to the Secretary evaluating epidemiological evidence. *Id.* But the court overlooked that the Secretary, in issuing Regulation 313 as a final rule in October, 1990, accepted the CDC's conclusion that NHL was correlated with Vietnam service but not dioxin exposure. Claims Based on Service in Vietnam, 55 Fed. Reg. 43,123, 43,124 (Oct. 26, 1990) (to be codified at 38 C.F.R. pts. 3 & 4); Claims Based on Exposure to Herbicides Containing Dioxin (Soft Tissue Sarcomas), 56 Fed. Reg. 51,651, 51,651 (Oct. 15, 1991) (to be codified at 38 C.F.R. pts. 3 & 4) (noting that "the bases for granting service connection are fundamentally different" for NHL and STS because NHL is linked to Vietnam service and STS to dioxin exposure). There is no evidence that Congress disagreed with that conclusion or overruled the Secretary's decision. Rather, Congress codified the Department's regulations as to all three diseases, including NHL.

B. The Panel's Failure To Apply The Pro-Veteran Canon Conflicts With This Court's Precedent.

1. This Court has instructed that, *before* applying *Chevron* deference, any interpretive ambiguity in the statute must be resolved in the veteran's favor. *Brown v. Gardner*, 513 U.S. 115, 118 (1994). Congress is presumed to incorporate that rule, *King v. St.*

Vincent's Hosp., 502 U.S. 215, 220-21 n.9 (1991), so as to benefit "those who left private life to serve their country in its hour of great need." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

Prior to the decision below, the Federal Circuit adhered to a "modified" rule of *Chevron* deference. *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 691-92 (Fed. Cir. 2000). It resolved ambiguity by applying the pro-veteran canon in Step One, and the only question thereafter is whether the agency has complied with the statute. *Boyer v. West*, 210 F.3d 1351, 1355 (Fed. Cir. 2000). However, it applied *Chevron* when the Department promulgates substantive gap-filling regulations (*i.e.*, when the agency is not merely interpreting the statute). *Terry v. Principi*, 340 F.3d 1378, 1383 (Fed. Cir. 2003); *Sears v. Principi*, 349 F.3d 1326, 1331-32 (Fed. Cir. 2003).

The Federal Circuit has now abandoned that framework. Even if the agency addresses a pure question of statutory interpretation, the Federal Circuit now will defer to the agency "despite [the] pro-claimant canon." App. 68a. The Federal Circuit's rule directly conflicts with *Brown* and *King* and requires this Court's review.[8]

2. In its supplemental opinion denying rehearing, the Federal Circuit alternatively held that Petitioner "waived" the right to argue the *Brown* canon on

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[8] The Federal Circuit's suggestion that the Department's construction is "pro-claimant" under *Brown* because it applies "to any veteran who set foot on land, even if for only a very short period of time" (App. 68a) is unsound. The Department's construction is the most restrictive that the statute arguably permits, and does not resolve ambiguity in favor of claimants.

rehearing because he did not raise that point in his merits brief. App. 67a. (The panel raised the *Brown* canon at oral argument, and Petitioner raised the issue before the CAVC Ct. App. JA 629). The Federal Circuit may have overlooked that Petitioner was the appellee and had no affirmative duty to raise any issues. *See Transamerica Ins. Co. v. South*, 125 F.3d 392, 399 (7th Cir. 1997) (reversing panel opinion on rehearing on grounds not previously argued, because "the failure of an appellee to have raised all possible alternative grounds for affirming the district court's original decision, unlike an appellant's failure to raise all possible grounds for reversal, should not operate as a waiver"). But even if the Federal Circuit had discretion not to grant rehearing, its concept of waiver is both erroneous and no bar to this Court's review.

First, Petitioner is aware of no other precedent that a canon of statutory interpretation is waived unless affirmatively argued. It is inherent in any question of statute interpretation that a court will apply the appropriate canons. *See United States v. Speers*, 382 U.S. 266, 277 n.22 (1965) (a court construing a statue "seizes every thing from which aid can be derived," whether argued or not).

Second, waiver applies only to issues, not arguments. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. Escondido*, 503 U.S. 519, 534 (1992). The issue of the proper construction of Section 1116 was squarely presented *and* decided below. This Court may consider any argument relevant to the statute's construction.

Finally, even if application of the *Brown* canon were somehow a separate issue, this Court may review any issue passed on *or* presented below. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (reaching issue addressed by the court of appeals "even if this were a claim not raised by petitioner below"). Notwithstanding its waiver finding, the Federal Circuit ruled on the merits that the *Brown* canon is inapplicable when the agency has a regulation on point. App. 67a-68a. This Court should review the Federal Circuit's evisceration of *Brown*, which has critical ramifications throughout veterans benefits law.

C. The Federal Circuit Improperly Granted *Chevron* Deference To The Department's Unreasonable Interpretation.

Even if the plain language and the *Brown* canon do not resolve the issue, the Federal Circuit erred in granting *Chevron* deference to the Department's "boots-on-land" interpretation. That interpretation does not appear in Regulation 307 (the regulation implementing the Agent Orange Act) or any other order with the force or effect of law. *See United States v. Mead Corp.*, 533 U. S. 218, 226–227 (2001). Rather, the Federal Circuit bootstrapped *Chevron* deference by treating other departmental pronouncements as interpretations of Regulation 307 and giving them substantial deference under *Auer v. Robbins*, 519 U.S. 452, 461-63 (1997), notwithstanding that the new interpretations are inconsistent with Department practice and "run[] counter to the 'intent at the time of the regulation's promulgation.'" *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006) (citation omitted).

Regardless, as the CAVC held and Judge Fogel declared in dissent, the Department's "boots-on-land" interpretation is unreasonable under Step Two of *Chevron*. The Department's interpretation is not informed by any scientific evidence that blue-water Navy veterans were not exposed to Agent Orange or otherwise not at excess risk of incurring the covered diseases because of their service. App. 61a-62a, 100a-101a.

The Federal Circuit nonetheless upheld the "boots-on-land" rule because line-drawing is always arbitrary. App. 47a. But this is precisely the point: Congress did not intend *any* lines to be drawn among Vietnam veterans because in 1991 there was not (and there is not today) either the scientific evidence to rule out certain classes of veterans as unexposed or the records of troop movements to allow for rational administration of such a rule.[9] There is no reason why Congress would want a soldier to recover if he set foot on land in Vietnam for one day in 1975 (years after Agent Orange spraying had ended), but not naval veterans (like Cdr. Haas) who were directly engulfed in drifting Agent Orange clouds.[10]

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[9] The Federal Circuit speculated that "the task of determining whether a particular veteran's ship at any point crossed into the territorial seas during an ocean voyage would seemingly be even more difficult" than determining whether a veteran set foot on land. Pet. App. at 68a. This is not so. All deck logs of ships operating more than thirty years ago are retained by and available from the Modern Military Branch, National Archives. These deck logs track the ship's latitude and longitude three times daily, and the ship's course and direction, among other things. *See* Navy Historical Center FAQs, www.history.navy.mil/faq73-1.htm (last accessed at Oct. 14, 2008).

[10] The Federal Circuit defended the Department's line-drawing by surmising that Congress would not have intended Section 1116 to cover long-distance pilots whose missions consisted

Indeed, contrary to the DVA's unscientific claim that only inland service had a significant exposure risk, Admiral Zumwalt, the former Chief of Naval Operations in Vietnam whose report the panel otherwise credited, recommended that at a minimum service connection should be presumed for any veteran within 20 kilometers of a spray area (which would include veterans serving in the territorial waters off the heavily sprayed coasts). Zumwalt Report at 70. But Admiral Zumwalt also recommended an alternative of presuming service connection for all Vietnam veterans (as the Secretary had done for NHL), because while overinclusive "it is the only alternative that will not unfairly preclude receipt of benefits by a [dioxin] exposed Vietnam veteran." *Id.* at 71. That is the approach Congress chose.

II. IMMEDIATE REVIEW IS NECESSARY TO AVOID PREJUDICE TO VETERANS.

This Court's review is justified alone by the critical importance of this case to the numerous blue-water Navy veterans who served in Vietnam and who have

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strictly of overflight in the airspace of Vietnam. App. 68a. But there is no reason why Congress would deny benefits to those pilots but grant them to other pilots who made single refueling stop on land, or why Congress would put claimants to that proof. In any event, interpreting Section 1116 on the basis of the assuredly small number of long-distance pilots whose service in Vietnam only involved overflights is the tail wagging the dog. Even if *arguendo* the Department has some basis for excluding overflight pilots from Section 1116, there is no warrant for excluding blue-water Navy veterans, given the statutory codification of an NHL regulation designed to give relief to that class.

been (or will be) stricken with covered diseases. But it is especially critical that this Court grant review now. The Federal Circuit, which has exclusive jurisdiction over this statute, has definitively resolved this issue. Vietnam veterans who have contracted the serious diseases addressed in Section 1116 are likely to be in dire financial straits. Delay in receiving benefits could be severely prejudicial to many veterans. Many veterans will also be deprived of free, priority VA medical care available to persons with Agent Orange diseases, see 38 U.S.C. §1710(e)(1)(A), and may forego medical care altogether, with serious consequences.

Moreover, if this Court were to deny review and the CAVC were to lift the current stay on *Haas*-related claims, many pending claims will be denied. Even if this Court were later to review and overturn the Federal Circuit's rule, many claims will never be revived, and others would face a demanding standard of clear and unmistakable error. 38 C.F.R. § 20.1403(e); *see also Jordan v. Nicholson*, 401 F.3d 1296 (Fed. Cir. 2005). Other veterans may never file claims, and still others will lose benefits from pre-claim periods if they are deterred by the decision below from filing. This Court's immediate review is imperative.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
FEDERAL CIRCUIT.

No. 2007-7037.

JONATHAN L. HAAS,
Claimant-Appellee,
v.
JAMES B. PEAKE, M.D., Secretary Of Veterans Affairs,
Respondent-Appellant.

May 8, 2008.

Barton F. Stichman, National Veterans Legal Services Program, of Washington, DC, argued for claimant-appellee. With him on the brief was Louis J. George, Todd M. Hughes, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for respondent-appellant. With him on the brief was Jeanne E. Davidson, Director. Of counsel on the brief were David J. Barrans, Deputy Assistant General Counsel, and Ethan G. Kalett, Staff Attorney, United States Department of Veterans Affairs, of Washington, DC.

Before MICHEL, *Chief Judge*, BRYSON, *Circuit Judge*, and FOGEL, *District Judge*.[1]

Opinion for the court filed by Circuit Judge BRYSON; Dissenting opinion filed by District Judge FOGEL.

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[1] Honorable Jeremy Fogel, District Judge, United States District Court for the Northern District of California, sitting by designation.

BRYSON, *Circuit Judge*.

Beginning in 1962, the United States used herbicides such as Agent Orange in Vietnam for the purpose of "defoliation, crop destruction, and on a smaller scale, clearing vegetation around U.S. fire bases and other installations, around landing zones, and along lines of communication." S.Rep. No. 100-439, at 64-65 (1988). Agent Orange consisted of an equal mixture by weight of two chemicals, 2, 4-dichlorophenoxyacetic acid and 2,4,5-trichlorophenoxyacetic acid. It also contained trace amounts of 2,3,7,8-tetrachlorodibenzo-para-dioxin, also known as dioxin. *Id.* at 64. The use of Agent Orange in Vietnam increased substantially between 1967 and 1969. Agent Orange came under scrutiny after a report from the National Institutes of Health indicated that 2,4,5,-trichlorophenoxyacetic acid was associated with birth defects in animals, although later research indicated that those birth defects were more likely caused by dioxin. *Id.* at 65; *see also* David A. Butler, *Connections: The Early History of Scientific and Medical Research on "Agent Orange"*, 13 J.L. & Policy 527, 545-48 (2005); Inst. Of Med., *Veterans and Agent Orange: Health Effects of Herbicides Used in Vietnam* 30 (1994) ("*Veterans and Agent Orange* ") (discussing later research). The use of Agent Orange was phased out by 1971. *Veterans and Agent Orange* at 27.

The impact of Agent Orange on humans has subsequently been the subject of much research and controversy. Congress has enacted several statutes mandating that research be conducted regarding the impact of Agent Orange on human health and providing that veterans be compensated for illnesses resulting from exposure to the chemical. This case concerns the Agent Orange Act of 1991, Pub.L. 102-4,

105 Stat. 11, which provided a special mechanism of disability compensation for veterans exposed to herbicides such as Agent Orange.

To receive disability compensation, a veteran must establish that the disability was service connected, which means that it must have been "incurred or aggravated . . . in the line of duty in the active military, naval, or air service." 38 U.S.C. § 101(16). The Agent Orange Act provided that for certain veterans and certain diseases, both exposure and service connection are presumed to be established. 38 U.S.C. § 1116(a)(1).

The statutory list of diseases as to which exposure and service connection are presumed includes non-Hodgkin's lymphoma, certain soft-tissue sarcomas, chloracne, Hodgkin's disease, porphyria cutanea tarda, certain respiratory cancers, multiple myeloma, and diabetes mellitus (type 2). *See*38 U.S.C. § 1116(a)(2). If a veteran can prove that he or she has one of the listed diseases and "served in the Republic of Vietnam" between January 9, 1962, and May 7, 1975, the disease will ordinarily "be considered to have been incurred in or aggravated by such service." 38 U.S.C. § 1116(a)(1)(A). Consequently, proving service "in the Republic of Vietnam" is important to any veteran who seeks compensation for one of the listed diseases.

This case calls on us to address whether veterans who served on ships off the coast of Vietnam during the Vietnam War served "in the Republic of Vietnam" and thus are entitled to the presumption of service connection if they suffer from one of the listed diseases. The government argues that the phrase "served in the Republic of Vietnam" requires that a servicemember have at some point set foot within the

land borders of Vietnam. Mr. Haas contends that the phrase extends to those who served on board ships in the waters off the Vietnamese coast but never went ashore.

By regulation, the Department of Veterans Affairs ("DVA") has interpreted the phrase "served in the Republic of Vietnam" to mean that the veteran's service must have involved "duty or visitation" in the Republic of Vietnam in order for the veteran to be entitled to the statutory presumption of service connection. *See*38 C.F.R. § 3.307(a)(6)(iii). That regulation, as interpreted by the DVA, made the statutory presumption of service connection unavailable to veterans such as appellant Jonathan Haas, who served on a naval vessel that traveled in the waters near Vietnam but who never went ashore. The Court of Appeals for Veterans Claims ("the Veterans Court") set aside the DVA's interpretation as unduly restrictive. *Haas v. Nicholson,* 20 Vet.App. 257 (2006). We hold that the agency's requirement that a claimant have been present within the land borders of Vietnam at some point in the course of his duty constitutes a permissible interpretation of the statute and its implementing regulation, and we therefore reverse the judgment of the Veterans Court.

I.

In August 2001, Mr. Haas applied to the Phoenix, Arizona, regional office of the DVA seeking disability compensation for type 2 diabetes, peripheral neuropathy, and loss of eyesight. He claimed that he had been exposed to herbicides while serving in Vietnam and that based on that exposure he was entitled to a finding of service connection for his conditions.

Mr. Haas served on active duty in the United States Navy from September 1959 to September 1960 and subsequently from May 1963 to June 1970. Service records indicate that from August 1967 to April 1969, Mr. Haas served on the U.S.S. *Mount Katmai*, which he described as an ammunition supply ship that operated in the West Pacific off the coast of Vietnam. It is undisputed that that Mr. Haas never went ashore, and thus never set foot on the physical landmass of the Republic of Vietnam. Mr. Haas explained that his ship did not visit any ports because it carried highly explosive ammunition and would have posed a threat if docked in a port. Mr. Haas subsequently left active duty and was transferred to the Retired Reserves on July 1, 1982.

Mr. Haas's claim to service connection for his condition is based on his naval service and the presumptive service connection afforded for type 2 diabetes based upon a showing that the veteran "served in the Republic of Vietnam." *See*38 U.S.C. §§ 1116(a)(1)(A), (a)(2)(H); 38 C.F.R. § 3.307(a)(6)(iii). In denying his claim, the regional office explained that in order to qualify for a presumption of service connection, Mr. Haas must have "physically served or visited in the Republic of Vietnam." For a sailor serving in the waters offshore, the regional office explained that "the ship must have come to port in the [Republic of Vietnam] and you disembarked." Mr. Haas disagreed with the regional office and contended that "service in the Republic of Vietnam," as defined by 38 C.F.R. § 3.307(a)(6)(iii), should be interpreted to include service in the offshore waters regardless of whether the servicemember's ship came to port and the servicemember disembarked.

On appeal, the Board of Veterans' Appeals affirmed the regional office's decision denying Mr. Haas the presumption of service connection. The Board applied the DVA's regulation, as interpreted by the agency, and ruled that Mr. Haas was not entitled to the statutory presumption for those who served "in the Republic of Vietnam" because he had never "set foot on land in the Republic of Vietnam." As for Mr. Haas's contention that he was actually exposed to herbicides while his ship operated near the coast of Vietnam, the Board rejected his claim on the ground that his allegation was "unsupported by any evidence demonstrating that his ship was located in waters sprayed by herbicides."

Mr. Haas then appealed to the Veterans Court. A three-judge panel of that court reversed the Board's decision. The court first found the phrase "served in the Republic of Vietnam" in 38 U.S.C. § 1116 to be ambiguous. The court explained that "[t]here are many ways in which to interpret the boundaries of a sovereign nation such as the former Republic of Vietnam" and that the "legislative history of the 1991 act . . . is silent concerning what constitutes 'service in the Republic of Vietnam.'" 20 Vet.App. at 263, 268. Turning to the DVA's interpretation of the statutory language, the court first examined the pertinent regulation, 38 C.F.R. § 3.307(a)(6)(iii). That regulation defines "service in the Republic of Vietnam" as including "service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam." The court determined that the regulation "do[es] not clearly preclude application of the presumption [of service connection] to a member of the Armed Forces who served aboard a ship in close proximity to the

landmass of the Republic of Vietnam." 20 Vet.App. at 259.

Finding that the regulation "merely has replaced statutory ambiguity with regulatory ambiguity," the Veterans Court then analyzed the DVA's interpretation of the regulation and concluded that the agency's current interpretation of its regulation conflicts with the agency's earlier interpretation of the same regulation. The court noted that the agency's original instructions to its adjudicators in the Adjudication Manual of the Veterans Benefits Administration, M21-1 ("Manual M21-1"), called for awarding presumptive service connection for specified diseases if the veteran had received the Vietnam Service Medal "in the absence of contradictory evidence," and that those provisions were not altered following the issuance of two precedential DVA General Counsel opinions on related topics. *See* DVA Op. Gen. Counsel Prec. 27-97 (1997) (finding that service on a deepwater vessel off the shore of Vietnam did not constitute service "in the Republic of Vietnam" under 38 U.S.C. § 101(29)(A)); DVA Op. Gen. Counsel Prec. 7-93 (1993) (finding that service in high altitude planes flying over Vietnam without any other contact with Vietnam did not constitute "service in Vietnam" under 38 C.F.R. § 3.313). Consequently, the court found that when the DVA adopted the "foot-on-land" test, it was reversing its previously established course. 20 Vet.App. at 270-72.

The Veterans Court further concluded that the agency's new interpretation was not a reasonable one. In so ruling, the Veterans Court noted that under the DVA's current interpretation of the regulation, the DVA "would afford the presumption of exposure to Agent Orange to a Vietnam-era veteran who

served only in the inland waterways of the Republic of Vietnam and never set foot on land; yet, in order for a Vietnam-era veteran serving in the waters surrounding Vietnam to be entitled to the presumption, he or she must have set foot on land, without consideration as to either the length of time spent patrolling in the waters offshore, or the risks of windblown exposure to Agent Orange sprayed along Vietnam's coastline." 20 Vet.App. at 275. The court explained that

> given the spraying of Agent Orange along the coastline and the wind borne effects of such spraying, it appears that these veterans serving on vessels in close proximity to land would have the same risk of exposure to the herbicide Agent Orange as veterans serving on adjacent land, or an even greater risk than that borne by those veterans who may have visited and set foot on the land of the Republic of Vietnam only briefly.

Id. at 273. Based on that reasoning, the court concluded that the DVA's interpretation of section 3.307(a)(6)(iii) was "plainly erroneous" and that the regulation "must be read to include at least service of the nature described by the appellant, that is, service in the waters near the shore of Vietnam." *Id.*

Finally, the Veterans Court ruled that the pertinent provisions of the DVA's Manual M21-1 were "substantive rules" and that the DVA's amendment of those provisions in February 2002 to incorporate the "foot-on-land" requirement was invalid because the DVA had failed to make that change pursuant to the notice-and-comment requirements of 5 U.S.C. § 553. 20 Vet.App. at 277. Alternatively, the court ruled that the February 2002 changes could not be applied retroactively to Mr. Haas's claim, which had been

filed in August 2001, because the effect of the rule change was to narrow the scope of Mr. Haas's substantive rights. *Id.* at 277-78. The court therefore reversed the Board's denial of Mr. Haas's claim to service connection for diabetes and held that in Mr. Haas's case, the Manual M21-1 provision "allowing for the application of the presumption of exposure to herbicides based on the receipt of the [Vietnam Service Medal] controls." *Id.* at 279.

II.

This court ordinarily will not hear appeals from the Veterans Court in cases that the Veterans Court remands to the Board of Veterans' Appeals. *See Adams v. Principi,* 256 F.3d 1318, 1320 (Fed.Cir.2001). Nonetheless, we have held that it is appropriate for us to review such cases in certain circumstances, under the principles set forth in *Williams v. Principi,* 275 F.3d 1361 (Fed.Cir.2002). This appeal addresses the purely legal question of the proper interpretation of a statute and its implementing regulations, a question that will not be affected by the proceedings on remand. Moreover, postponing review until after completion of the proceedings on remand could deprive the government of its right to review of the legal issue in this case, because the Secretary of Veterans Affairs has no right to seek review of a Board decision in favor of the veteran under 38 U.S.C. § 7252(a). We therefore conclude that this appeal is ripe for review even though the Veterans Court remanded the case for further proceedings before the Board. *See Williams,* 275 F.3d at 1364.

III.

On the merits, the parties disagree about the proper resolution of virtually every issue in this case:

whether the phrase "served in the Republic of Vietnam" in the Agent Orange Act of 1991 is ambiguous; whether the DVA's regulation that interprets that phrase is itself ambiguous; whether the agency's interpretation of that regulation is entitled to deference, or instead is unreasonable and inconsistent with the agency's previous, longstanding interpretation of the regulation; and whether the DVA's 2002 modification to Manual M21-1 constituted a substantive regulatory change that could not be given effect without notice-and-comment rulemaking.

A.

In order to make sense of the statutory and regulatory arguments made by the parties, it is necessary to review the history of the legislative and regulatory measures directed to the issue of herbicide exposure in Vietnam. That history, both prior to and after the enactment of the Agent Orange Act of 1991, is complex.

Beginning in the late 1970s, Congress responded to widespread expressions of concern by veterans' groups regarding the health effects on Vietnam veterans of exposure to Agent Orange and other herbicides used in the conflict there. In 1979, Congress enacted a provision requiring the Veterans Administration ("VA"), as the agency was then known, to conduct an epidemiological study of persons who, while serving in the armed forces during the war in Vietnam, were exposed to dioxins produced during the manufacture of various herbicides, including Agent Orange, to determine if there might be long-term adverse health effects from such exposure. Pub.L. No. 96-151, § 307, 93 Stat. 1092, 1097-98 (1979). The responsibility for conducting that study was subsequently reassigned to the Centers for Disease Control

("CDC"). *See*H.R.Rep. No. 98-592, at 5 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4449, 4451. Congress directed the VA to publish a description of the actions that it planned to take in response to those reports. Pub.L. No. 97-72, § 401, 95 Stat. 1047, 1061-62 (1981).

In 1984, Congress enacted the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub.L. No. 98-542, 98 Stat. 2725 (1984). Section 5 of that Act directed the VA to prescribe regulations establishing guidelines and standards for resolving claims for benefits based on exposure during service "in the Republic of Vietnam during the Vietnam era to a herbicide containing dioxin." In particular, the statute called the VA's attention to evidence that three diseases-chloracne, porphyria cutanea tarda, and soft tissue sarcoma-are associated with exposure to certain levels of dioxin and directed the VA to determine whether service connection should be granted in individual cases involving each of those diseases. *Id.* §§ 2(5), 5(b)(2)(A)(i), 5(b)(2)(B).

In response, the VA promulgated a regulation that presumed exposure to a herbicide containing dioxin for any veteran who served "in the Republic of Vietnam" during the Vietnam era. The regulation concluded that the development of chloracne manifested within three months of exposure would be presumed to be service-connected, but that porphyria cutanea tarda and soft tissue sarcomas were not sufficiently associated with dioxin exposure to warrant similar treatment. 38 C.F.R. § 3.311a (1986); *see*50 Fed.Reg. 34,452 (Aug. 26, 1985). The regulation defined "Service in the Republic of Vietnam" to include "service in the waters offshore and service in other locations, if the conditions of service involved duty or visitation in

the Republic of Vietnam." 38 C.F.R. § 3.311a(a)(1) (1986). The VA explained that the regulation was adopting the VA's "longstanding policy of presuming dioxin exposure in the cases of veterans who served in the Republic of Vietnam during the Vietnam era." 50 Fed.Reg. at 34,454-55. That policy was "based on the many uncertainties associated with herbicide spraying during that period which are further confounded by lack of precise data on troop movements at the time." *Id.* at 34,455. "While it may be possible to approximate areas where herbicides were sprayed," the agency wrote, "it would be extremely difficult to determine with an acceptable degree of precision whether an individual veteran was exposed to dioxin." *Id.* Accordingly, the agency adhered to its prior policy of presuming exposure for servicemembers who had served in Vietnam. In addition, the agency provided that because some military personnel who were stationed elsewhere "may have been present in the Republic of Vietnam, 'service in the Republic of Vietnam' will encompass service elsewhere if the person concerned actually was in the Republic of Vietnam, however briefly."(50 Fed.Reg. 15,848, 15,849) (Apr. 22, 1985) (proposed rule). The VA added that "[i]n view of shifting personnel deployments, absence of on-site measurement of dioxin contamination and other factors the Agency has adhered to a policy of presuming exposure if the veterans served in Vietnam during the relevant period. This section formalizes that existing policy." *Id.* at 15,849; *see also*50 Fed.Reg. 34,452 (Aug. 26, 1985) (adopting proposed rule unamended).

Meanwhile, congressional committees continued to hold hearings to assess the epidemiological studies of Agent Orange that had been mandated in 1979. Those studies were designed to determine whether

any component of Agent Orange-not just dioxin-affected human health, although given its notoriety dioxin often figured prominently in the research and analysis. *See Veterans and Agent Orange* at x; *see also id.* at 28-36 (discussing history of research on Agent Orange). The success of those studies depended on determining which veterans had been exposed to Agent Orange and the extent of their exposure, so that health problems among veterans who had been highly exposed could be compared to those of a control group. *See id.* at 58. The VA and the CDC ran into a series of problems in attempting to make that determination. Initially, it was believed that exposure could be deduced from studying ground troop movements in conjunction with records of aerial spraying of Agent Orange. *See id.* That approach proved unworkable, as a representative of the Centers for Disease Control explained in testimony before a subcommittee of the House Committee on Veteran's Affairs:

> When CDC got into this, it was assumed there would be records that could determine exactly where an individual was on a given day, and that could be correlated with known [herbicide] use. I think with the finest use of existing records, you cannot separate between exposed and unexposed. You can get some . . . approximations, but it would be a disservice to veterans and to everyone to proceed with an expensive study of this nature if you can't clearly differentiate between who's been exposed and who's not exposed. Without that, you have no basis to proceed with doing a study.

Agent Orange Studies: Hearing Before the Subcomm. on Hospitals and Health Care of the H. Comm. on

Veterans' Affairs, 99th Cong. 15 (1986) ("1986 House Hearing") (statement of James O. Mason, CDC Director); *see also Veterans and Agent Orange* at 58.

In light of those difficulties, the CDC attempted to derive an exposure index through other means. Initially, an attempt was made to develop an index by measuring the amount of dioxin present in fat samples from veterans. 1986 House Hearing at 81-83 (statement of James O. Mason, CDC Director). Although the objective was to study Agent Orange, it was expected that determining dioxin levels would indicate the degree of exposure to Agent Orange. *See Veterans and Agent Orange* at 259-62 (describing use of dioxin as a "biomarker"). That procedure, however, did not bear fruit because of the practical difficulties of obtaining fatty tissue samples. *Id.* at 82-83. Subsequent research based on blood tests did not reveal any difference in the blood levels of dioxin between a group of veterans stationed in Vietnam and a control group of veterans stationed outside of Vietnam. The CDC ultimately concluded that it had no validated scientific method of identifying a group of veterans who were highly exposed to Agent Orange. *Agent Orange Legislation and Oversight: Hearing on S. 1692, the Proposed "Agent Orange Disabilities Benefits Act of 1987"; S. 1787, the proposed "Veterans' Agent Orange Disabilities Act of 1987"; and Agent Orange Oversight Issues Before the S. Comm. on Veterans' Affairs*, 100th Cong. 165-66 (1988) (statement of Thomas E. Harvey, Deputy Administrator of the VA). The CDC explained that "the Agent Orange Exposure Study . . . cannot be done . . . . The difficulty is and has always been the inability to discriminate between exposed and unexposed ground troops." *Id.* at 165 (discussing the inability to derive an exposure

index from military records, self-reporting, and direct measurements of dioxin from tissue samples).

Although the CDC was unable to conduct the Agent Orange exposure study as it was originally conceived by Congress in 1979 due to the inability to identify with scientific certainty which Vietnam veterans had been highly exposed to Agent Orange, there remained other sources of scientific information on the health effects of Agent Orange and dioxin in humans. One ongoing study focused on the group of Vietnam veterans who had been involved in the aerial spraying of Agent Orange, known as the "Ranch Hand study" after the name of the mission responsible for conducting the spraying operation. *See Veterans and Agent Orange* at 53. Further data has also been available, for example, from populations that were exposed to chemical accidents involving dioxin, workers at factories manufacturing herbicides, and agricultural or forestry workers who were exposed to herbicides similar to Agent Orange or herbicides containing dioxin before their use was largely banned in the United States. *See id.* at 36-45.

Against the backdrop of the ongoing scientific investigations, the VA declined to change its regulations after 1985 to provide a presumption of in-service exposure for any diseases other than chloracne, on the ground that the scientific evidence did not show a statistically probable association between Agent Orange exposure and any other disease. In litigation initiated by veterans' advocacy groups, however, a federal district court ruled that the agency, by then renamed the Department of Veterans Affairs, had applied too stringent a standard for determining which diseases to include in its regulations promulgated under the 1984 Dioxin Act. *See Nehmer*

v. U.S. Veterans Admin., 712 F.Supp. 1404, 1420 (N.D.Cal.1989). The DVA subsequently amended its regulation, 38 C.F.R. § 3.311a, to include soft tissue sarcomas. *See* 56 Fed.Reg. 7632 (Feb. 25, 1991) (proposed rule); 56 Fed.Reg. 51,651 (Oct. 15, 1991) (final rule).

In October 1990, the DVA promulgated a separate regulation providing that "Service in Vietnam during the Vietnam Era," together with subsequent development of non-Hodgkin's lymphoma, "is sufficient to establish service connection for that disease." 38 C.F.R. § 3.313. That regulation was based on information in a CDC study that had been released earlier that year. *See* 55 Fed.Reg. 25,339 (June 21, 1990) (proposed rule). The CDC study found a statistically significantly elevated level of non-Hodgkin's lymphoma among Vietnam veterans by comparing veterans who served in Vietnam and those who served in other locations during the Vietnam era. For purposes of the analysis, the study treated veterans who were stationed off the coast of Vietnam as Vietnam veterans. *See The Association of Selected Cancers with Service in the U.S. Military in Vietnam, as reprinted in Centers for Disease Control Selected Cancers Study and Scientific Reviews of the Study: Hearing before the H. Comm. On Veterans' Affairs*, 101st Cong.2d Sess. 106 (1990) ("1990 CDC Study"). The study concluded that there was no evidence that the increased risk of non-Hodgkin's lymphoma among Vietnam veterans was related to exposure to Agent Orange in Vietnam. *Id.* at 81, 125.

In the 1990 regulation, the DVA defined "Service in Vietnam" to include "service in the waters offshore, or service in other locations if the conditions of service involved duty or visitation in Vietnam." 38

C.F.R. § 3.313 (1991). That language was similar to the language previously used to define "service in the Republic of Vietnam," but it differed in two subtle, but important respects. First, the 1990 regulation referred to "Service in Vietnam" rather than using the statutory phrase "service in the Republic of Vietnam." Second, the placement of the comma before the word "or" in the definition of "service in Vietnam" in the 1990 regulation, section 3.313, suggested that the requirement of visitation or duty in Vietnam applied to "service in other locations," but not to "service in the waters offshore." Section 3.311 a used the word "and" rather than "or" and did not have a comma separating the reference to "service in the waters offshore" and "service in other locations," which suggested that the requirement of visitation or duty in the Republic of Vietnam applied to both of those forms of extraterritorial service.

The government does not dispute that the 1990 non-Hodgkin's lymphoma regulation, which is still in effect, applies to veterans who served "offshore" and never visited the landmass of Vietnam, as those veterans were among those found to have an elevated risk of non-Hodgkin's lymphoma in the 1990 CDC study. In fact, in 1993 the DVA issued a General Counsel opinion in which the agency explicitly stated that the non-Hodgkin's lymphoma regulation covers servicemembers who served in the waters off the shore of Vietnam, although the opinion concluded that the regulation does not cover servicemembers whose involvement in the Vietnam theater was limited to high-altitude missions in Vietnamese airspace. DVA Op. Gen. Counsel Prec. 7-93 (Aug. 12, 1993).

By contrast, the government asserts that under the more general 1985 dioxin exposure regulation, section 3.311 a, a veteran who served offshore must have set foot on the landmass of Vietnam in order to satisfy the regulatory definition of having served "in the Republic of Vietnam." The punctuation of the earlier definition in the 1985 regulation, section 3.311a, supports the government's position, as it suggests that the requirement of visitation or duty in the Republic of Vietnam applies to both "service in other locations" and "service in the waters offshore."

In 1991, Congress enacted the Agent Orange Act, Pub.L. No. 102-4, 105 Stat. 11, which established a more comprehensive statutory framework for herbicide-based claims. As enacted, the Agent Orange Act specified three diseases-non-Hodgkin's lymphoma, certain soft tissue sarcomas, and chloracne-and provided that when one of those diseases became manifest "in a veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the Vietnam era," the disease would be considered to have been incurred in or aggravated by such service.[2] Pub.L. No. 102-4, § 2(a), 105 Stat. 11, 12 (1991) (now codified, as amended, at 38 U.S.C. § 1116(a)(1)). In addition, the Act directed the DVA to identify other diseases associated with herbicide ex-

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[2] Congress included non-Hodgkin's lymphoma on the list of diseases specifically identified in the Agent Orange Act based on evidence that, contrary to the conclusion of the 1990 CDC study, non-Hodgkin's lymphoma was in fact associated with exposure to Agent Orange. *See Report to the Secretary of Veterans Affairs on the Association Between Adverse Health Effects and Exposure to Agent Orange, reprinted* in *Links Between Agent Orange, Herbicides, and Rare Diseases: Hearing before the Human Resources and Intergovernmental Relations Subcomm. of the Comm. on Gov't Relations,* 101st Cong., 2d Sess. 22, 41 (1990).

posure. The Act provided that any veteran who "served in the Republic of Vietnam during the Vietnam era" and has a disease designated by the Secretary "shall be presumed to have been exposed during such service to an herbicide agent containing dioxin or 2, 4-dichlorophenoxyacetic acid, and may be presumed to have been exposed during such service to any other chemical compound in an herbicide agent, unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service." Pub.L. No. 102-4, § 2(a), 105 Stat. at 12 (now codified, as amended, at 38 U.S.C. § 1116(f)).

The legislative history of the Agent Orange Act indicates that Congress sought to strike a balance between waiting for the results of scientific research regarding the effects of Agent Orange and providing benefits for Vietnam veterans with current health problems. The Chairman of the House Committee on Veterans' Affairs stated:

> The question of whether compensation should be paid for disabilities allegedly related to exposure to herbicides has gone on for much too long . . . . It has received an inordinate amount of attention and energy. It is time to move on and, in doing so, to leave in place a mechanism for continuing scientific scrutiny which, if allowed to work, can assuage the remaining concerns of affected veterans.

137 Cong. Rec. 2348 (1991) (statement of Rep. Montgomery). The Act therefore codified the presumption of service connection for the three diseases already covered by DVA regulations, mandated independent scientific review through the National Academy of Sciences, and instructed the Secretary of the DVA to consider designating additional diseases as service-

connected when recommended by the National Academy of Sciences. Importantly for present purposes, the focus of Congress's attention was on the scientific evidence as to what diseases were linked to Agent Orange exposure; there was no indication during the legislative process that Congress focused on the precise scope that should be attached to the statutory phrase "served in the Republic of Vietnam."

When the DVA drafted regulations for the Agent Orange Act, it incorporated the definition of the phrase "service in the Republic of Vietnam" from the 1985 general dioxin exposure regulation, 38 C.F.R. § 3.311a. *See* 58 Fed.Reg. 50,528, 50,529 (Sept. 28, 1993) (adopting amended section 3.307(a)(6)). Thus, the DVA defined "service in the Republic of Vietnam" to mean "service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam." 38 C.F.R. § 3.307(a)(6)(iii) (1994). The DVA explained that in light of the enactment of the Agent Orange Act it was no longer necessary to retain the general dioxin exposure regulation, 38 C.F.R. § 3.311a. However, the DVA noted that the definition of the phrase "service in the Republic of Vietnam" in the new regulation would be incorporated directly from the definition in section 3.311a. 58 Fed.Reg. 50,528, 50,529 (Sept. 28, 1993) (proposed rule).

The following year, the DVA issued another set of regulations in which it added Hodgkin's disease and porphyria cutanea tarda to the list of diseases for which the agency would presume exposure and service connection based on presence in Vietnam during the Vietnam era. *See*59 Fed.Reg. 5106 (Feb. 3, 1994). The new regulation retained the language from the general dioxin exposure regulation of 1985

and continued to define "service in the Republic of Vietnam" to include "service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam." 38 C.F.R. § 3.307(a)(6)(iii) (1995).

The question whether the phrase "service in the Republic of Vietnam" included servicemembers whose service was limited to ships that had traveled in waters off the shore of Vietnam came into sharp focus in 1997. First, in a precedential General Counsel opinion issued that year, the DVA construed the phrase "served in the Republic of Vietnam" in 38 U.S.C. § 101(29)(A) not to apply to servicemembers whose service was on ships and who did not serve within the borders of the Republic of Vietnam during a portion of the "Vietnam era." The opinion stated that the definition of the phrase "service in the Republic of Vietnam" in the Agent Orange regulation, 38 C.F.R. § 3.307(a)(6)(iii), "requires that an individual actually have been present within the boundaries of the Republic to be considered to have served there," and that for purposes of both the Agent Orange regulation and section 101(29)(A), service "in the Republic of Vietnam" does not include service on ships that traversed the waters offshore of Vietnam absent the servicemember's presence at some point on the landmass of Vietnam. DVA Op. Gen. Counsel Prec. 27-97 (1997).

Later that same year, in a proposed regulation addressing incidents of spina bifida among the children of servicemembers who had served in Vietnam, the DVA proposed to use the same regulatory definition for "service in the Republic of Vietnam" that it had used in the 1985 regulation and the Agent Orange regulation. *See*62 Fed.Reg. 23,724, 23,725 (May 1,

1997) (proposed rule). A commenter objected to the definitional language and urged that the phrase "if the conditions of service involved duty or visitation in the Republic of Vietnam" be eliminated from the regulation. *See*62 Fed. 51,274, 51,274-75 (Sept. 30, 1997) (final rule). The DVA declined to make that change. It explained the reason for not making the suggested change as follows:

> Because herbicides were not applied in waters off the shore of Vietnam, limiting the scope of the term service in the Republic of Vietnam to persons whose service involved duty or visitation in the Republic of Vietnam limits the focus of the presumption of exposure to persons who may have been in areas where herbicides could have been encountered.

62 Fed.Reg. at 51,274.

In 2001, the DVA issued a proposed regulation to include type 2 diabetes among the illnesses for which presumptive service connection would be recognized based on herbicide exposure. *See* 66 Fed.Reg. 2376 (Jan. 22, 2001) (proposed rule). The proposed regulation would presume herbicide exposure based on "service in the Republic of Vietnam," which would continue to be defined to cover service in waters offshore of Vietnam "if the conditions of service involved duty or visitation in the Republic of Vietnam." The DVA subsequently adopted the proposed rule including type 2 diabetes among those diseases as to which presumptive service connection would be recognized. 66 Fed.Reg. 23,166 (May 8, 2001) (final rule).

In the course of the rulemaking proceeding, a comment was made urging the DVA to use that pro-

ceeding to make clear that "service in the Republic of Vietnam" includes "service in Vietnam's inland waterways or its territorial waters." The comment was based on the assertion that U.S. military personnel had been exposed to herbicides while serving in those locations. In its final rulemaking order, the DVA responded that it is "commonly recognized" that the statutory term "in the Republic of Vietnam" includes the inland waterways. 66 Fed.Reg. at 23,166. With respect to service in the offshore waters, however, the DVA explained that even before the enactment of the Agent Orange Act, the agency had taken the position that service offshore required some duty or visitation within the Republic of Vietnam to qualify for the presumptions of herbicide exposure and service connection, and that service on a deepwater vessel offshore did not constitute such service. The DVA added that the commenter had cited "no authority for concluding that individuals who served in the waters offshore of the Republic of Vietnam were subject to the same risk of herbicide exposure as those who served within the geographical boundaries of the Republic of Vietnam, or for concluding that offshore service is within the meaning of the statutory phrase 'Service in the Republic of Vietnam.'" *Id.* Accordingly, the agency declined to make the suggested change. Later that year, Congress followed the DVA's lead by adding type 2 diabetes to the list of diseases included in section 1116(a)(2). *See* Veterans Education and Benefits Expansion Act of 2001, Pub.L. No. 107-103, § 201(b), 115 Stat. 967.

In early 2002, the DVA amended the language of its Adjudication Manual M21-1 to specifically incorporate the agency's "foot-on-land" interpretation of the Agent Orange regulations. Before the amendment, the Manual provided that in determining

whether a veteran had "service in Vietnam," it would ordinarily be sufficient that the veteran had received the Vietnam Service Medal, but that it might be necessary in some cases to determine if the veteran's ship had been in the vicinity of Vietnam for some significant period of time. The amended version of Manual M21-1, published in February 2002, stated that, under section 3.307(a)(6) of the regulations, a veteran "must have actually served on land within the Republic of Vietnam (RVN) to qualify for the presumption of exposure to herbicides." M21-1, part III, paragraph 4.24(e)(1) (Feb. 27, 2002). It added that the fact that a veteran has been awarded the Vietnam Service Medal "does not prove that he or she was 'in country,' " because servicemembers "who were stationed on ships off shore, or who flew missions over Vietnam, but never set foot in-country, were sometimes awarded the Vietnam Service Medal." *Id.*

In 2004, the DVA published a proposed rule, as part of a proposed wholesale revision of the DVA's regulations, in which it once again articulated its position with respect to offshore service. Citing the diabetes regulation, the DVA explained that veterans who served on the inland waterways of Vietnam "may have been exposed to herbicides" and that service on the inland waterways "constitutes service in the Republic of Vietnam" within the meaning of 38 U.S.C. § 1116. However, the agency restated that it was

> not aware of any valid scientific evidence showing that individuals who served in the waters offshore of the Republic of Vietnam or in other locations were subject to the same risk of herbicide exposure as those who served within the geographic land boundaries of the Republic of

> Vietnam. Furthermore, we are not aware of any legislative history suggesting that offshore service or service in other locations are within the meaning of the statutory phrase, "Service in the Republic of Vietnam."

69 Fed.Reg. 44,614, 44,620 (July 27, 2004) (proposed rule). Accordingly, the DVA proposed to revise its regulation "to make it clear that veterans who served in waters offshore but did not enter Vietnam, either on its land mass or in its inland waterways cannot benefit from this presumption." *Id.*

The new benefits regulations, including the proposed rule regarding offshore service, have not yet been finally adopted. However, while this appeal was pending the DVA initiated a rulemaking proceeding that would amend section 3.307(a)(6)(iii) to incorporate the DVA's interpretation of the regulation as part of the regulatory text. The amended version of the regulation would define "service in the Republic of Vietnam" for purposes of section 3.307 to include "only service on land, or on an inland waterway, in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975." 73 Fed.Reg. 20,566, 20,571 (Apr. 16, 2008). In explaining the reason for the amendment, the agency referred to the litigation in this case and then stated that in its view the statutory reference to service in the Republic of Vietnam "is most reasonably interpreted to refer to service within the land borders of the Republic of Vietnam." *Id.* at 20,568. The agency explained its position as follows:

> It is both intuitively obvious and well established that herbicides were commonly deployed in foliated land areas and would have been released seldom, if at all, over the open waters off the

> coast of Vietnam. The legislative and regulatory history indicates that the purpose of the presumption of exposure was to provide a remedy for persons who may have been exposed to herbicides because they were stationed in areas where herbicides were used, but whose exposure could not actually be documented due to inadequate records concerning the movement of ground troops.

Because it is known that herbicides were used extensively on the ground in the Republic of Vietnam, and because there are inadequate records of ground-based troop movements, it is reasonable to presume that any veteran who served within the land borders of Vietnam was potentially exposed to herbicides, unless affirmative evidence establishes otherwise. There is no similar reason to presume that veterans who served solely in the waters offshore incurred a significant risk of herbicide exposure.

Id. Although the DVA conceded that it was "conceivable that some veterans of offshore service incurred exposure under some circumstances due, for example, to airborne drift, groundwater runoff, and the proximity of individual boats to the Vietnam coast," it stated that for purposes of the presumption of exposure, "there is no apparent basis for concluding that any such risk was similar in kind or degree to the risk attending service within the land borders of the Republic of Vietnam." *Id.* Moreover, observing that offshore service "encompasses a wide range of service remote from land and thus from areas of actual herbicide use," the DVA concluded that "there is no reason to believe that any risk of herbicide exposure would be similarly pervasive among veterans of

offshore service as among veterans of service within the land borders of Vietnam." *Id.*

B.

We first address the government's argument that the pertinent language of 38 U.S.C. § 1116 is ambiguous and that the DVA's regulation issued pursuant to that statute, 38 C.F.R. § 3.307(a)(6)(iii), is entitled to deference as a permissible interpretation of the statute. Under the *Chevron* doctrine, "when an agency invokes its authority to issue regulations, which then interpret ambiguous statutory terms, the courts defer to its reasonable interpretations." *Fed. Express Corp. v. Holowecki*, —U.S. —, 128 S.Ct. 1147, 1154, 170 L.Ed.2d 10 (2008); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) (a court will defer to an agency's regulatory interpretation of a statute if the statute is ambiguous or contains a gap that Congress has left for the agency to fill through regulation). "Step one" of the *Chevron* analysis considers whether "Congress has directly spoken to the precise question at issue," a question that we analyze using the traditional tools of statutory interpretation. *Chevron*, 467 U.S. at 842-43, 104 S.Ct. 2778; *Cathedral Candle Co. v. Int'l Trade Comm'n*, 400 F.3d 1352, 1362 (Fed.Cir.2005).

The relevant portion of section 1116(a)(1)(A) provides that for a veteran who suffers from one of several specified diseases, including type 2 diabetes, and who "during active military, naval, or air service, served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975," the disease "shall be considered to have been incurred in or aggravated by such service." As applied to veterans who served in waters offshore of

Vietnam but not on the landmass of Vietnam, the Veterans Court concluded that the statutory phrase "served in the Republic of Vietnam" is ambiguous.[3]

The court first noted that "[t]here are many ways in which to interpret the boundaries of a sovereign nation such as the former Republic of Vietnam." 20 Vet.App. at 263. The court then surveyed different sources that define sovereign nations in different ways, ranging from including only the nation's landmass to including the nation's "exclusive economic zone," which can extend up to 200 miles from the coastline. *Id.* at 263-64. The government agrees with the Veterans Court that section 1116 is ambiguous in this respect. Mr. Haas, however, argues that the statute has a plain meaning that covers servicemembers in his position.

Addressing the phrase "served in the Republic of Vietnam," Mr. Haas asserts that "[a]ll relevant definitions of the sovereign nation of the Republic of

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[3] In its brief, the government mistakenly refers to section 1116(f) as the provision at issue in this case. Because Mr. Haas's disease is one of those listed in section 1116(a)(2), it is section 1116(a)(1), not section 1116(f), that governs his claim. Section 1116(f) was originally enacted as subsection (a)(3) of the first section of the Agent Orange Act, and it applied to diseases referred to in subsection (a)(1)(B). When the Act was amended in 2001, subsection (a)(3) became section 1116(f), and it was modified to apply to diseases other than those referred to in subsections (a)(1) or (a)(2). The legislative history of the 2001 amendment makes it quite plain that the new section 1116(f) was designed to make the Act applicable to new diseases, not to affect the preexisting scope of subsection (a)(1). S.Rep. No. 107-86, at 10-12 (2001). The erroneous reference makes no difference to the analysis in this case, however, as the pertinent phrase "served in the Republic of Vietnam" appears in both sections 1116(a)(1) and 1116(f).

Vietnam include the territorial waters off the landmass of Vietnam." To support that assertion, Mr. Haas cites to two definitions identified by the Veterans Court, Presidential Proclamation 5928 (1989) and the United Nations Convention on the Law of the Sea ("UNCLOS"). Both definitions include the nation's "territorial sea," which is generally defined as extending 12 nautical miles from a nation's coast. Yet Mr. Haas does not explain why other definitions, such as the contrary ones cited by the Veterans Court, are not "relevant." Neither the language of the statute nor its legislative history indicates that Congress intended to designate one of the competing methods of defining the reaches of a sovereign nation. We therefore agree with the Veterans Court that the statutory phrase "served in the Republic of Vietnam" is ambiguous as applied to service in the waters adjoining the landmass of Vietnam.

Based on a textual analysis of section 1116, Mr. Haas asserts that Congress made its intention clear that active duty personnel who served on ships offshore of Vietnam should be considered to have "served in the Republic of Vietnam" within the meaning of 38 U.S.C. § 1116(a)(1)(A). His argument is that if a veteran "served in the Republic of Vietnam" and has one of the diseases listed in section 1116(a)(2), such as diabetes, the veteran does not need to provide evidence that he or she was actually exposed to herbicides. By contrast, under section 1116(a)(1)(B), service connection is presumed only if the veteran "served in the Republic of Vietnam" and "while so serving was exposed to" an herbicide. Because proof of actual exposure is not required under section 1116(a)(1)(A), Mr. Haas argues that there is no reason to require proof of actual presence on the landmass of Vietnam. He contends that the govern-

ment's asserted justification for the "foot-on-land" approach-that herbicides are only sprayed on land-is not relevant under section 1116(a)(1)(A), which by its terms does not require direct herbicide exposure.

Contrary to Mr. Haas's contention, the statutory provision that obviates the need to prove herbicide exposure for certain diseases neither says nor implies anything about the meaning of the phrase "served in the Republic of Vietnam." Congress simply concluded that for those who served in Vietnam, it was too difficult to determine who was exposed and who was not. But in so concluding, Congress did not indicate that service "in" the Republic of Vietnam included service on the waters offshore or in any other location nearby. Nor did Congress suggest that exposure was not important to the determination of service connection. The entire predicate for the Agent Orange Act and its regulations was exposure to herbicides in general and Agent Orange in particular. The fact that Congress presumed exposure for veterans who served in Vietnam does not by any means suggest that exposure was considered unimportant and that veterans in other areas therefore do not have to prove exposure. Thus, there is no force to Mr. Haas's argument based on the difference between section 1116(a)(1)(A) and section 1116(a)(1)(B).

Mr. Haas next contends that the legislative history of the Agent Orange Act demonstrates that Congress intended to give those who served only in offshore waters the benefit of section 1116(a). His argument is based on statements in the legislative history of the Agent Orange Act that Congress intended to codify the DVA's then-existing regulations on diseases meriting a presumption of service connection for Vietnam veterans. *See, e.g.*, 137 Cong. Rec. 2345 (1991)

(statement of Rep. Montgomery) ("This compromise would codify administrative decisions of the Secretary of Veterans Affairs in deeming three conditions service-connected for compensation purposes."); *id.* at 2352 (statement of Rep. Stump) ("H.R. 556 codifies current VA policy regarding agent orange compensation by establishing in statute a presumption of service-connection for non-Hodgkin's lymphoma, soft-tissue sarcoma, and chloracne.").

The problem with that argument is that the references to the regulatory presumptions in the legislative history did not distinguish between the broader definition of "service in Vietnam" provided in the non-Hodgkin's lymphoma regulation (section 3.313) and the narrower definition of "service in the Republic of Vietnam" found in the chloracne/soft tissue sarcoma regulation (section 3.311a). In the absence of any clearer statement in the legislative record, which Mr. Haas has not identified, the remarks about the existing regulations do not support the construction of the statutory phrase "served in the Republic of Vietnam" that he advocates. If anything, the different circumstances that prompted the issuance of the two regulations and the fact that only the chloracne/soft tissue sarcoma regulation used the precise phrase that was later incorporated into the statute-"service in the Republic of Vietnam" (section 3.311a) rather than "service in Vietnam" (section 3.313)-suggest the contrary conclusion. The chloracne/soft tissue sarcoma regulation was based on scientific evidence linking those diseases to dioxin exposure. The Agent Orange Act was similarly designed to provide compensation for exposure to Agent Orange. The non-Hodgkin's lymphoma regulation, by contrast, was not predicated on exposure, but instead was based on evidence of an association between non-Hodgkin's

lymphoma and service in the Vietnam theater, including service aboard ships. Thus, the Agent Orange Act closely tracked the narrower chloracne/soft tissue sarcoma regulation, which defined "service in the Republic of Vietnam" to apply to those who served in the waters offshore only if their service included "duty or visitation in the Republic of Vietnam."

C

Having concluded that the phrase "served in the Republic of Vietnam" in section 1116 is ambiguous, we next turn to "step two" of the *Chevron* analysis, which requires a court to defer to an agency's authorized interpretation of the statute in question if "the agency's answer is based on a permissible construction of the statute." *Chevron,* 467 U.S. at 843, 104 S.Ct. 2778. We therefore address the DVA regulation that defines the phrase "service in the Republic of Vietnam" to mean "service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam." 38 C.F.R. § 3.307(a)(6)(iii).

First, we note that Congress has given the DVA authority to interpret the statute, both under its general rulemaking authority, 38 U.S.C. § 501, and in the Agent Orange Act itself, 38 U.S.C. § 1116(a)(1)(B). Second, we agree with the Veterans Court that the regulation reflects a reasonable interpretation of the statute in that it requires some presence in Vietnam, even if the veteran's service largely occurred elsewhere.

The government contends that the regulation makes clear that service connection is presumed only for veterans who were at some point present on the

landmass of Vietnam. We believe that is probably the most natural reading of the language of the regulation that refers to "duty or visitation in the Republic of Vietnam." That is, we agree with the government that "duty or visitation" in the Republic of Vietnam seems to contemplate actual presence on the landmass of the country. However, the question as to the meaning of the phrase "duty or visitation in the Republic of Vietnam" is not free from doubt, as "duty" or "visitation" could be understood to refer to "duty" or "visitation" within the broader area encompassed, for example, by the territorial waters of the Republic. Thus, both the phrase "duty or visitation in the Republic of Vietnam" and the phrase "waters offshore" are sufficiently ambiguous that the language of the regulation cannot be said to resolve the issue with certainty.

D

For that reason, we must look to the DVA's interpretation of its own regulation and determine whether that interpretation resolves the legal issue before us. Generally, "an agency's interpretation of its own regulations is controlling unless plainly erroneous or inconsistent with the regulations being interpreted." *Long Island Care at Home, Ltd. v. Coke*, —U.S. —, 127 S.Ct. 2339, 2346, 168 L.Ed.2d 54 (2007) (internal quotations omitted); *see also Auer v. Robbins*, 519 U.S. 452, 461-63, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997). An agency's interpretation of its regulations is entitled to "substantial deference," requiring a court to defer to the agency's interpretation "unless an alternative reading is compelled by the regulation's plain language or by other indications of the [agency's] intent at the time of the regulation's promulgation." *Thomas Jefferson Univ. v. Shalala*,

512 U.S. 504, 512, 114 S.Ct. 2381, 129 L.Ed.2d 405 (1994), quoting *Gardebring v. Jenkins,* 485 U.S. 415, 430, 108 S.Ct. 1306, 99 L.Ed.2d 515 (1988).

That rule does not apply if a particular regulation merely "parrots" statutory language, because if it did, an agency could bypass meaningful rule-making procedures by simply adopting an informal "interpretation" of regulatory language taken directly from the statute in question. *See Gonzales v. Oregon,* 546 U.S. 243, 257, 126 S.Ct. 904, 163 L.Ed.2d 748 (2006); *Christensen v. Harris County,* 529 U.S. 576, 588, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000) (an agency cannot "under the guise of interpreting a regulation . . . create *de facto* a new regulation"). In this case, however, we are satisfied that the DVA regulation does more than merely parrot section 1116. The Supreme Court in *Gonzales v. Oregon* characterized the regulation in that case as a parroting regulation because it "just repeats two statutory phrases and attempts to summarize the others." 546 U.S. at 257, 126 S.Ct. 904. The Court added that the regulation "gives little or no instruction on a central issue." *Id.* By contrast, the regulation at issue in this case, 38 C.F.R. § 3.307(a)(6)(iii), elaborates on the statutory phrase "served in the Republic of Vietnam" by construing it to include service offshore and service in other locations as long as the service "involved duty or visitation in the Republic of Vietnam." That language qualifies as interpretation rather than reiteration.

The fact that the regulation is itself subject to competing interpretations, depending on whether it is read to require duty or visitation on land, as opposed to duty or visitation within Vietnam's territorial waters, does not mean that the regulation merely parrots the statute. It is not unusual for an interpre-

tive regulation to be itself ambiguous; that happens, in fact, whenever a court is required to look to an agency's interpretation of a regulation that in turn interprets a statute. *See, e.g., Auer,* 519 U.S. at 461-63, 117 S.Ct. 905; *Cathedral Candle Co.,* 400 F.3d at 1352, 1363-64. In such cases, courts do not disregard the regulation and its interpretation as long as the regulation reflects the agency's exercise of its interpretive authority and does not simply "restate the terms of the statute itself." *Gonzales,* 546 U.S. at 257, 126 S.Ct. 904; *see id.* at 256, 126 S.Ct. 904 (deference was accorded to the agency's interpretation in *Auer* because "the underlying regulations gave specificity to a statutory scheme the [agency] was charged with enforcing and reflected the considerable experience and expertise the [agency] had acquired over time . . . ."). For these reasons, it is appropriate to defer to the DVA's asserted interpretation unless it is plainly erroneous or inconsistent with the regulations.

The Veterans Court concluded that it did not need to grant deference to the DVA's interpretation of section 3.307(a)(6)(iii) for several reasons: because the DVA's interpretation of the regulation has been inconsistent; because the DVA's interpretation was based on what the court considered plainly erroneous statutory analysis in a precedential opinion of the DVA's General Counsel; and because the court regarded the DVA's interpretation as unreasonable in that the agency has interpreted service in Vietnam differently under two different regulations and has failed to point to scientific evidence supporting its interpretation. We address each issue in turn.

1. The Veterans Court first decided that the DVA's current interpretation of section 3.307(a)(6)(iii) conflicts with the agency's prior interpretation of the

regulation, and that the agency's current interpretation therefore merits less deference than it might otherwise deserve. We agree with the Veterans Court that there has been some inconsistency in the DVA's application of section 3.307(a)(6)(iii), but we do not agree that the DVA's inconsistency deprives the agency's interpretation of entitlement to deference, particularly in light of the fact that the agency has interpreted its regulation consistently for some years, going back to a time well before Mr. Haas filed the application for benefits that is at issue in this case.

For several years after the enactment of the Agent Orange Act and the corresponding regulations, the DVA did not formally interpret the regulatory reference to service "in the Republic of Vietnam." During that period the agency did not give any explanation of the meaning of the proviso requiring "duty or visitation in the Republic of Vietnam" in cases involving servicemembers whose principal service was in the waters offshore of Vietnam.

During that period, DVA adjudicators relied on the DVA's Adjudication Manual M21-1, which instructed DVA adjudicators on how to determine whether claimants had served "in the Republic of Vietnam." That 1991 version of Manual M21-1 provided as follows in pertinent part:

> (1) It may be necessary to determine if a veteran had "service in Vietnam" in connection with claims for service connection for non-Hodgkin's lymphoma, soft-tissue sarcoma and chloracne . . . . In the absence of contradictory evidence, "service in Vietnam" will be conceded if the records shows [sic] that the veteran received the Vietnam Service Medal.

> (2) If a veteran who did not receive the Vietnam Service Medal claims service connection for non-Hodgkin's lymphoma, soft tissue sarcoma or chloracne and alleges service on a ship in the waters offshore Vietnam, review the record for evidence that the ship was in the vicinity of Vietnam for some significant period of time (i.e., more than just in transit through the area). If the veteran cannot produce evidence that the ship was in the waters offshore Vietnam, contact the Compensation and Pension Service Projects Staff. Be prepared to furnish the name of the ship, the number of the ship, and the dates that it is alleged to have been in the waters offshore Vietnam.

M21-1, part III, paragraph 4.08(k). The government contends on appeal, as it did in the Veterans Court, that the "contradictory evidence" mentioned in paragraph (1) has always included evidence that a veteran did not set foot in Vietnam. The Veterans Court concluded, however, that the second paragraph addressing the special case of veterans on board ships, which never mentions a foot-on-land requirement, would not have been necessary if the first paragraph had already implicitly contained a requirement that the veteran set foot on land in order to have "served in the Republic of Vietnam." 20 Vet.App. at 276.

We agree with the Veterans Court's analysis of the Manual M21-1 provision. The government's argument that the Manual provision incorporates the requirements of section 3.307(a)(6)(iii) simply reads too much into the "contradictory evidence" provision of Manual M21-1. In particular, the government's contention that M21-1 has always contained a "foot-on-land" requirement is unconvincing given that the

Vietnam Service Medal was awarded to a broader class of service members than those who served on the landmass of Vietnam. *See* Exec. Order No. 11231 (July 8, 1965) (establishing award of the Vietnam Service Medal "to members of the armed forces who serve[d] in Vietnam or contiguous waters or air space").

Moreover, paragraph (2) of the Manual M21-1 provision, which refers to the possible need to review evidence that a veteran's ship was in the vicinity of Vietnam for some period of time, suggests that the Adjudication Manual did not exclude the possibility of benefits being granted to a veteran who never set foot in Vietnam. We therefore reject the government's suggestion that the DVA's current interpretation of the "service in the Republic of Vietnam" language in section 3.307(a)(6)(iii) could be discerned from the outset in Manual M21-1.

Even though the 1991 version of the Manual and later versions issued on several occasions during the 1990s do not reflect the DVA's present interpretation of section 3.307(a)(6)(iii), the Veterans Court was nonetheless mistaken to conclude that the inconsistency between the early versions of the Manual and the agency's current interpretation of the regulation deprives the DVA's current interpretation of the right to judicial deference. As noted above, the DVA adopted its current interpretation of section 3.307(a)(6)(iii) in 1997. Since that time, it has reiterated its interpretation on numerous occasions, including by amending Manual 21-1 in 2002 to expressly incorporate the "foot-on-land" interpretation of the Agent Orange regulations and then formally rescinding the Manual provision in 2008. *See* 73 Fed.Reg. 20,363 (Apr. 15, 2008). Thus, any lack of

clarity or inconsistency in the DVA's interpretation of the Agent Orange regulations has long since been resolved, and the "foot-on-land" policy is now firmly in place.

The DVA made its interpretation clear first in DVA General Counsel Opinion 27-97, the 1997 General Counsel opinion that ruled that sailors on deepwater vessels who did not set foot on land in Vietnam were not "in the Republic of Vietnam" within the meaning of 38 U.S.C. § 101(29)(A). In the course of analyzing section 101(29)(A), the opinion noted that the regulatory definition in 38 C.F.R. § 3.307(a)(6)(iii) "requires that an individual actually have been present within the boundaries of the Republic to be considered to have served there." The opinion concluded that the definition of "service in the Republic of Vietnam" in the regulation was consistent with the definition of the same phrase in section 101(29)(A), which the General Counsel interpreted to require physical presence on the landmass of Vietnam.

During the same year, the DVA set forth its interpretation of the regulatory language again in its response to comments on the spina bifida regulation. *See* 62 Fed.Reg. 51,274 (Sept. 30, 1997). The DVA explained that "[b]ecause herbicides were not applied in waters off the shore of Vietnam, limiting the scope of the term service in the Republic of Vietnam to persons whose service involved duty or visitation in the Republic of Vietnam limits the focus of the presumption of exposure to persons who may have been in areas where herbicides could have been encountered." More significantly for purposes of this case, in the very regulation that made type 2 diabetes the subject of presumed service connection (and thus provided the basis for Mr. Haas's claim), the DVA noted that

service offshore does not constitute "service in the Republic of Vietnam." 66 Fed.Reg. 23,166, 23,166 (May 8, 2001).

To be sure, during the 1990s the DVA was not entirely consistent in its adjudications of claims arising under the Agent Orange Act. Mr. Haas cites four Board of Veterans' Appeals decisions that he contends support his position that a servicemember is entitled to presumptions of exposure to herbicides and service connection based on service offshore of Vietnam. The two earliest Board decisions support his argument, but the other two are at best unclear as to their interpretation of section 3.307(a)(6)(iii). For its part, the government cites a number of other decisions in which the Board applied the regulation as urged by the government, i.e., requiring proof of some duty or visitation onshore in Vietnam. The dates of the decisions cited by the government range from 1998 to 2005; both of the Board decisions that support Mr. Haas's position are from 1997.

While it is true that "[a]s a general matter . . . the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views," *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 698, 111 S.Ct. 2524, 115 L.Ed.2d 604 (1991) (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988)), the DVA never formally adopted the position urged by Mr. Haas either in General Counsel opinions or in the rulemaking process. And even though the agency's current interpretation of its regulations differs from the position it took in some previous adjudications and seemed to take in its Adjudication Manual, that inconsistency does not mean that its current interpretation does not deserve deference.

The Supreme Court made that point clear in its recent decision in *Long Island Care at Home,* 127 S.Ct. at 2349:

> [W]e concede that the Department may have interpreted these regulations differently at different times in their history . . . . But as long as interpretive changes create no unfair surprise-and the Department's recourse to notice-and-comment rulemaking in an attempt to codify its new interpretation . . . makes any such surprise unlikely here-the change in interpretation alone presents no separate ground for disregarding the Department's present interpretation.

See also Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 742, 116 S.Ct. 1730, 135 L.Ed.2d 25 (1996) (change under the *Chevron* doctrine is "not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency").

In this instance, the agency's position has been consistent for more than a decade, and there is "no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Auer,* 519 U.S. at 462, 117 S.Ct. 905. Moreover, because the agency adopted its current interpretation long before Mr. Haas filed his claim, and long before the statute and regulations were amended to include type 2 diabetes among the diseases entitled to special consideration, there is no issue of "unfair surprise" here. Accordingly, we conclude that the DVA's interpretation of section 3.307(a)(6)(iii) merits deference unless that interpretation is plainly erroneous or inconsistent with the language of the regulation.

2. The Veterans Court concluded that the DVA's interpretation of section 3.307(a)(6)(iii) is "plainly erroneous" in part because it is based on what the court regarded as flawed legal analysis in DVA General Counsel Opinion 27-97. As noted, that General Counsel opinion construes 38 U.S.C. § 101(29), a related statute that defines the term "Vietnam era" for purposes of title 38 and in the course of the discussion sets forth the DVA's interpretation of section 3.307(a)(6)(iii). We find nothing in the opinion's analysis that renders the DVA's interpretation plainly erroneous.

The General Counsel opinion examines the question whether veterans who served on deepwater Navy vessels in the vicinity of Vietnam between 1961 and 1975 are considered to have served "during the Vietnam era," as that phrase is used in 38 U.S.C. § 101(29). That question arose because the Veterans' Benefits Improvements Act of 1996 enlarged the statutory period of the "Vietnam era" to the period beginning on February 28, 1961, to May 7, 1975, "in the case of a veteran who served in the Republic of Vietnam during that period." Pub.L. No. 104-275, § 505, 110 Stat. 3322, 3342 (1996). The General Counsel opinion addresses whether service on an aircraft carrier would constitute service in the Vietnam era for purposes of section 101(29) during the period between February 28, 1961, and August 5, 1964, the period for which service "in the Republic of Vietnam" was required. DVA Op. Gen. Counsel Prec. 27-97 (1997). Focusing on legislative history that emphasized Congress's concern with ground troops who had been present on the landmass of Vietnam before August 1964, the General Counsel determined that service offshore was not included within the meaning of service "in the Republic of Vietnam."

Although the General Counsel opinion does not directly support the DVA's interpretation of section 3.307(a)(6)(iii), it makes clear that the agency viewed the regulatory definition of "service in the Republic of Vietnam" in section 3.307(a)(6)(iii) as closely parallel to the definition of that term in 38 U.S.C. § 101(29)(A). Having interpreted section 101(29)(A) as requiring actual service "within the borders of the Republic of Vietnam" during the pertinent period, i.e., on the landmass of Vietnam, the opinion noted that section 3.307(a)(6)(iii) also requires that individuals "not actually stationed within the borders of the Republic of Vietnam" have been "present within the boundaries of the Republic to be considered to have served there."

We do not agree with the Veterans Court that the General Counsel opinion was legally flawed. While it is true that the amendment to section 101(29)(A) was meant to encompass veterans who may have been at risk for exposure to herbicides prior to 1964, as the Veterans Court stated, the General Counsel opinion merely pointed out that in addressing soldiers who may have been exposed to herbicides during that time period, Congress's express focus was on ground troops. The opinion correctly noted that there was no indication in the legislative history that Congress intended for the definition of section 101(29)(A) to include service on a deep-water vessel off the shores of Vietnam within the scope of the phrase "served in the Republic of Vietnam."

What is particularly important about the General Counsel opinion is that it made clear at least as early as 1997 that the agency interpreted section 3.307(a)(6)(iii) to require presence on the landmass of Vietnam. We see nothing in the General Counsel

opinion that renders that interpretation of section 3.307(a)(6)(iii) plainly erroneous.

3. The Veterans Court then found the DVA's interpretation of "service in the Republic of Vietnam" in 38 C.F.R. § 3.307(a)(6)(iii) to be unreasonable because it was not the product of "valid or thorough reasoning." 20 Vet.App. at 273.

First, the court criticized the DVA's interpretation of the phrase "service in the Republic of Vietnam" in section 3.307(a)(6)(iii) because it differs from the DVA's interpretation of the phrase "service in Vietnam" in the non-Hodgkin's lymphoma regulation, 38 C.F.R. § 3.313. 20 Vet.App. at 274. The court's criticism of that inconsistency, however, fails to account for the differences in language, scientific basis, and legal authorization between the two regulations. Section 3.307 (formerly section 3.311 a) was the regulatory predecessor of the Agent Orange Act; it was based on the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, and it included diseases that had been found to be linked to herbicide exposure. Section 3.313, however, was based on the agency's more general authority to adopt regulations "with respect to the nature and extent of proofs and evidence . . . in order to establish the right to benefits." 38 U.S.C. § 210(c) (1982). It was not based on herbicide exposure, but on a CDC study of the occurrence of non-Hodgkin's lymphoma in different groups of veterans, which was specifically found not to be related to herbicide exposure. *See* 55 Fed.Reg. 25,339 (June 21, 1990) (proposing section 3.313); 1990 CDC Study at 81, 125. Because the CDC study included veterans who served exclusively aboard ships that traveled off the coast of Vietnam among the tested group of Vietnam veterans, it made sense for section

3.313 to include those veterans as beneficiaries of the regulation. Under these circumstances, it was not unreasonable for the agency to interpret the two regulations differently.[4]

Second, the Veterans Court also found the DVA's interpretation of section 3.307(a)(6)(iii) unreasonable based on the agency's failure to offer scientific evidence in support of the line it drew at the Vietnamese coast and the seeming arbitrariness of some results produced by that line. 20 Vet.App. at 274-75.

Due in part to problems of testing for herbicide exposure and in part to the difficulties in tracking troop movements, it has proved difficult to determine which groups of veterans were exposed to herbicides and to what extent. Congress and the DVA have therefore resorted to a line-drawing process that concededly does not closely track levels of actual exposure. Thus, Congress has determined that for certain diseases, all veterans who served for any period of time in Vietnam will be presumed to have established service connection, even if there is no showing that they were exposed to herbicides or were in areas of herbicide use. The DVA, required to draw a line where Congress's intention was unclear, has construed the statute not to extend presumed service

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[4] Mr. Haas argues that the non-Hodgkin's lymphoma regulation, section 3.313, not the general dioxin exposure regulation, section 3.311 a, was the true predecessor to section 3.307(a)(6)(iii). That contention is plainly wrong. When proposing section 3.307(a)(6)(iii), the Secretary of Veterans Affairs specifically stated that the definition of "service in the Republic of Vietnam" was taken from section 3.311 a, *see* 58 Fed.Reg. 50,528, 50,529 (Sept. 28, 1993), and the text of the two regulations is virtually identical (and significantly different from the text of section 3.313).

connection to those who were in the Vietnam theater but who served only offshore or in other locations. The DVA has explained the rationale for its line-drawing, which is that Agent Orange was sprayed only on land, and therefore the best proxy for exposure is whether a veteran was present within the land borders of the Republic of Vietnam. In a statement accompanying its recent proposed amendment to section 3.307(a)(6)(iii), the DVA explained:

> As a factual matter, our legislative interpretation accords with what is known about the use of herbicides during Vietnam. Although exposure data is largely absent, review of military records demonstrate[s] that virtually all herbicide spraying in Vietnam, which was for the purpose of eliminating plant cover for the enemy, took place overland . . . . Regarding inland waterways, Navy riverine patrols reported to have routinely used herbicides for clearance of inland waterways . . . . Blue water Navy service members and other personnel who operated off shore were away from herbicide spray flight paths, and therefore were not likely to have incurred a risk of exposure to herbicide agents comparable to those who served in foliated areas where herbicides were applied.

73 Fed.Reg. at 20,568. In light of that explanation, which accords with the position taken by the DVA for the past decade, and in the absence of evidence that the line drawn by the DVA is irrational, we are not prepared to substitute our judgment for that of the agency and impose a different line.

The Veterans Court pointed out that service on land could be fleeting and could occur far from the area where herbicides were used, while service on the water could include extended service in coastal wa-

ters close to areas where herbicides were used. Under the DVA's interpretation of its regulation, a servicemember in the first category would be entitled to a presumption of service connection for one of the designated diseases, while a servicemember in the second category would not, even though the second servicemember would seem intuitively more likely to have been exposed to herbicides than the first. 20 Vet.App. at 273.

There are no doubt some instances in which the "foot-on-land" rule will produce anomalous results. That is not surprising. Line-drawing in general often produces instances in which a particular line may be overinclusive in some applications and underinclusive in others. As the Supreme Court has explained, "any line must produce some harsh and apparently arbitrary consequences." *Mathews v. Diaz,* 426 U.S. 67, 83, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976). But just because some instances of overinclusion or underinclusion may arise does not mean that the lines drawn are irrational. *See Vance v. Bradley,* 440 U.S. 93, 108, 99 S.Ct. 939, 59 L.Ed.2d 171 (1979) (line-drawing is upheld even if the classification "is to some extent both underinclusive and overinclusive, and hence the line drawn by Congress is imperfect"); *Mass. Bd. of Ret. v. Murgia,* 427 U.S. 307, 314, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976) ("Perfection in making the necessary classifications is neither possible nor necessary.").

The asserted arbitrariness of the line-drawing done by the agency in this case is in part the result of Congress's decision to extend the presumption of service connection to all persons who served for any period and in any area within the Republic of Vietnam. Because that blanket rule provides a presumption of

service connection to some persons who were unlikely to be exposed, it makes virtually any line-drawing effort appear unreasonable as applied to those who were outside of Vietnam but near enough to have had some chance of exposure.

In our view, it was not arbitrary for the agency to limit the presumptions of exposure and service connection to servicemembers who had served, for some period at least, on land. Drawing a line between service on land, where herbicides were used, and service at sea, where they were not, is prima facie reasonable. Moreover, the line drawn by the agency does not cut off all rights of sea-going veterans to relief based on claims of herbicide exposure, in that even servicemembers who are not entitled to the presumption of exposure are nonetheless entitled to show that they were actually exposed to herbicides, as Mr. Haas has endeavored to do in this case. *See* 38 C.F.R. § 3.309(e). The DVA's interpretation of section 3.307(a)(6)(iii) as excluding servicemembers who never set foot within the land borders of Vietnam thus was not unreasonable, and it certainly did not rise to the level of being "plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 89 L.Ed. 1700 (1945); *see Smith v. Nicholson*, 451 F.3d 1344, 1349-51 (Fed.Cir.2006).

In an effort to demonstrate that the DVA's interpretation was not only unsupported by science but was contrary to scientific studies, Mr. Haas argues that servicemembers serving offshore could have been exposed to Agent Orange through several mechanisms, such as "runoff" carrying toxic chemicals into the sea, "spray drift" transporting toxins via the wind, and the shipboard consumption of drinking

water produced by evaporative distillation. As support for the last of those contentions, he cites to a study conducted for the Australian Department of Veterans Affairs suggesting that Vietnam veterans of the Royal Australian Navy may have been exposed to herbicide compounds by drinking water distilled on board their vessels. Nat'l Research Ctr. for Envtl. Toxicology, Queensland Health Scientific Servs., *Examination of the Potential Exposure of Royal Australian Navy (RAN) Personnel to Polychlorinated Dibenzodioxins and Polychlorinated Dibenzofurans via Drinking Water* (Dec. 12, 2002).

The Australian study and the other cited sources were not part of the record below and were not considered either by the Veterans Court or by the DVA in its prior rulemaking proceedings. Judgments as to the validity of such evidence and its application to the particular problem of exposure to herbicides in Vietnam are properly left to Congress and the DVA in the first instance; this court is not the proper forum for an initial analysis of such evidence and its implications for the DVA's policies. We note, however, that in its most recent rulemaking proceeding the DVA made the following observations with respect to the Australian study:

> VA scientists and experts have noted many problems with the study that caution against reliance on the study to change our long-held position regarding veterans who served off shore. First, as the authors of the Australian study themselves noted, there was substantial uncertainty in their assumptions regarding the concentration of dioxin that may have been present in estuarine waters during the Vietnam War . . . . Second, even with the concentrating effect found

> in the Australian study, the levels of exposure estimated in this study are not at all comparable to the exposures experienced by veterans who served on land where herbicides were applied . . . . Third, it is not clear that U.S. ships used distilled drinking water drawn from or near estuarine sources or, if they did, whether the distillation process was similar to that used by the Australian Navy.

73 Fed.Reg. 20,566, 20,568 (Apr. 16, 2008). Based on that analysis, the DVA stated that "we do not intend to revise our long-held interpretation of 'service in Vietnam.'" *Id.* As to other cited studies, the DVA stated in connection with the publication of the rescission of the Manual M21-1 provision at issue in this case that none of those studies "bears significantly on the specific question whether herbicides used, and as administered, by the U.S. military during the Vietnam Era could have been blown by the wind into the ocean, or into inland waters that then carried the chemical into the ocean, to reach a boat offshore and result in any significant risk of herbicide exposure." 73 Fed.Reg. 20,363, 20,364 (Apr. 15, 2008).

Without reference to evidence, the Veterans Court stated that "it appears that these veterans serving on vessels in close proximity to land would have the same risk of exposure to the herbicide Agent Orange as veterans serving on adjacent land." 20 Vet.App. at 273. The dissenting judge in this court likewise concludes, also without reference to supporting evidence, that veterans such as Mr. Haas "have asserted a reasonable claim that they may have been exposed to herbicides." But focusing on the facts of Mr. Haas's claim, including his assertion that his ship was within 100 feet of the coast of Vietnam, does little to

help answer the question of how the statutory phrase "served in the Republic of Vietnam" should be interpreted. The Veterans Court, for example, did not suggest what would constitute the proper interpretation of the statute, but merely concluded that the DVA's regulation "must be read to include at least service of the nature described by the appellant, that is, service in the waters near the shore of Vietnam." A standard such as "near the shore" is unmanageably vague, not to mention its lack of mooring in the statutory or regulatory language. By contrast, the DVA's interpretation is a plausible construction of the statutory language and it is based on a simple but undisputed fact-that spraying was done on land, not over the water. Applying the substantial deference that is due to an agency's interpretation of its own regulations, we uphold the DVA's interpretation of section 3.307(a)(6)(iii).

E.

Finally, the Veterans Court concluded that the pertinent provision of the DVA's Manual M21-1, although styled as an interpretation of the law, was actually a substantive rule that could not be changed without compliance with formal notice-and-comment rulemaking procedures. Accordingly, the Veterans Court concluded that the 2002 change in Manual M21-1, in which the DVA made clear that "service in the Republic of Vietnam" would not apply to servicemembers who had not visited the landmass of Vietnam, was not valid because the change was not effected through notice-and-comment rulemaking. 20 Vet.App. at 277. On appeal, the government contends that the Manual M21-1 provisions are properly viewed as interpretive rules, and thus could be

changed by the agency without formal rule-making procedures.[5]

Sections 4 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553, requires agencies to publish proposed rules in the Federal Register for notice and comment. Although that requirement does not apply by its terms to matters "relating to . . . benefits," 5 U.S.C. § 553(a)(2), the "benefits" exception does not apply to rules and regulations promulgated by the DVA, 38 U.S.C. § 501(d). The DVA's rules relating to benefits are therefore subject to the notice and comment requirements of the APA. Importantly, however, those requirements do not apply to "interpretative rules, general statements of policy, or rules of agency organization, procedure or practice." 5 U.S.C. § 553(b)(3)(A). Because interpretive rules are not substantive rules having the force and effect of law, they are not subject to the statutory notice-and-comment requirements. *See Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99, 115 S.Ct. 1232, 131 L.Ed.2d 106 (1995); *Chrysler Corp. v. Brown,* 441 U.S. 281, 301-02 & n. 31, 99 S.Ct. 1705, 60 L.Ed.2d 208 (1979).

While substantive rules are those that effect a change in existing law or policy or that affect individual rights and obligations, interpretive rules "clarify or explain existing law or regulation and are exempt from notice and comment under section 553(b)(A)." *Paralyzed Veterans of Am. v. West,* 138 F.3d 1434, 1436 (Fed.Cir.1998); *see also Animal Legal Def. Fund v. Quigg,* 932 F.2d 920, 927

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[5] As we have noted, while not changing its legal position the DVA has recently acted to obviate this issue for the future by publishing a formal notice in the Federal Register rescinding the pertinent provision of Manual M21-1. *See* 73 Fed.Reg. 20,363 (Apr. 15, 2008).

(Fed.Cir.1991); *Am. Hosp. Ass'n v. Bowen,* 834 F.2d 1037, 1045 (D.C.Cir.1987). An interpretive rule "merely 'represents the agency's reading of statutes and rules rather than an attempt to make new law or modify existing law.'" *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs,* 260 F.3d 1365, 1375 (Fed.Cir.2001), quoting *Splane v. West,* 216 F.3d 1058, 1063 (Fed.Cir.2000).

We conclude that the pertinent provision of Manual M21-1 is an interpretive statement, not a substantive rule. As the DVA has explained, Manual M21-1 "is an internal manual used to convey guidance to VA adjudicators. It is not intended to establish substantive rules beyond those contained in statute and regulation." 72 Fed.Reg. 66,218, 66,219 (Nov. 27, 2007). The provision at issue in this case did not set forth a firm legal test for "service in the Republic of Vietnam," but simply provided guidance as to how an adjudicator should go about gathering information necessary to determine whether the regulatory test had been satisfied. As such, the Manual provided reasonably easily applied guidance for adjudicators in an effort to obtain consistency of outcome; it did not define the boundaries of the DVA's legal responsibility with precision.

The 1991 version of Manual M21-1 noted that ordinarily the statutory and regulatory test would be satisfied by proof of receipt of the Vietnam Service Medal. The reference to the Vietnam Service Medal did not displace the legal test for service "in the Republic of Vietnam," but merely directed adjudicators to perform a simple initial analysis, which was sufficient to determine compliance with that test in the great majority of cases. For that reason, we conclude that the pre-2002 version of Manual M21-1 was not a

substantive rule that could be amended only by notice-and-comment rulemaking.[6] Indeed, to treat receipt of the Vietnam Service Medal as a "test" of eligibility for the statutory presumption would be clearly contrary to the Agent Orange Act, because it is undisputed that some servicemembers who received the Vietnam Service Medal were never either in Vietnam or in its territorial waters; accordingly, those servicemembers could not properly be regarded as having served "in the Republic of Vietnam" under any definition of that phrase.

Importantly, it was through notice-and-comment rulemaking that the DVA set forth its position with regard to offshore service in connection with the very regulation that is at issue in this case. In May 2001, the DVA issued the regulation in which it made type 2 diabetes a disease subject to the regulatory presumption of service connection. In so doing, the agency clearly set forth its view as to the status of servicemembers who had served in the waters off Vietnam and had not set foot on shore. Those servicemembers, the agency explained, were not within the scope of the regulatory presumption. *See* 66 Fed.Reg. 23,166 (May 8, 2001).

That regulation became effective in July 2001, a month before Mr. Haas filed his claim for service connection for diabetes. The agency had thus for-

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[6] Mr. Haas argues that *Fugere v. Derwinski*, 972 F.2d 331 (Fed.Cir.1992), supports his argument regarding the amendment of Manual M21-1. In that case, however, the only issue before this court was whether a provision of the Manual conflicted with a statute. This court did not address whether the Manual provision in question constituted a substantive rule that could be amended only through notice-and-comment rulemaking.

mally taken a position by then that excluded Mr. Haas from the scope of the regulation. The fact that the DVA did not also subject the amended version of Adjudication Manual M21-1, which followed the position taken in the 2001 rulemaking proceeding, to notice-and-comment rulemaking did not make the agency's actions with regard to Mr. Haas's claim unlawful. In sum, the agency's formal position with respect to the requirement of visitation or duty on land was established well before Mr. Haas's application for benefits and was reiterated in the diabetes rulemaking proceeding in May 2001. Contrary to the suggestion of the Veterans Court, it was not necessary for the agency to conduct a parallel rulemaking proceeding before incorporating the same rule into its more informal Adjudication Manual.

[15] Because the DVA properly followed its established interpretation of statutory section 1116 and regulatory section 3.307(a)(6)(iii) when it rejected Mr. Haas's claim, we also disagree with the Veterans Court's ruling that the DVA's decision in Mr. Haas's case represents an impermissible retroactive application of the 2002 amendment to Manual 21-1. The agency's interpretation of the statute and regulation were clear by 2001, before Mr. Haas filed his claim. The fact that the agency waited until early 2002 to amend its internal Adjudication Manual to correspond with that interpretation did not prejudice Mr. Haas and does not confer any rights on him.

IV.

For the foregoing reasons, we reverse the Veterans Court's ruling rejecting the DVA's interpretation of section 3.307(a)(6)(iii) of the agency's regulations as requiring the servicemember's presence at some point on the landmass or the inland waters of Vietnam. We

remand to the Veterans Court for further proceedings consistent with this opinion. Before the Veterans Court on remand, Mr. Haas is free to pursue his claim that he was actually exposed to herbicides while on board his ship as it traveled near the Vietnamese coast. However, he is not entitled to the benefit of the presumptions set forth in 38 U.S.C. § 1116 and the corresponding DVA regulations, which are limited to those who "served in the Republic of Vietnam."

Each party shall bear its own costs for this appeal.

REVERSED and REMANDED.

FOGEL, District Judge, dissenting.

Although I agree with much of the majority's thorough analysis of the relevant legislative and regulatory history, I respectfully disagree with its ultimate holding. Because I conclude that the VA's refusal to apply the presumption of 38 U.S.C. § 1116(a) to Haas and others similarly situated is inconsistent with the intent of the statute and thus is based upon an unreasonable interpretation of the subject regulation, I would affirm the judgment of the Veterans Court. *See Haas v. Nicholson,* 20 Vet.App. 257 (2006).

While judicial deference to the experience and expertise of administrative agencies is an important principle of our jurisprudence, the historical context in which both courts and agencies act also is important. The present case is the latest skirmish in a decades-long dispute between Vietnam-era veterans and the VA over the health effects of Agent Orange. In 1984, Congress enacted the *Veterans' Dioxin and Radiation Exposure Compensation Standards Act,* Pub.L. No. 98-542, 98 Stat. 2725 (1984) ("Dioxin Act"), the purpose of which was "to ensure that Vet-

erans' Administration disability compensation [was] provided to veterans who were exposed during service in the Armed Forces in the Republic of Vietnam to a herbicide containing dioxin . . . ."*Id.* Following its enactment, a group of Vietnam-era veterans and surviving spouses brought suit against the VA for its alleged failure to comply with the Act's provisions. *Nehmer v. U.S. Veterans Admin.,* 712 F.Supp. 1404 (N.D.Cal.1989).

Specifically, the veterans challenged the VA's final rule, 38 U.S.C. § 3.311a(d), which stated that " 'sound scientific and medical evidence does not establish a cause and effect relationship between dioxin exposure' and any other disease but chloracne." *Nehmer,* 712 F.Supp. at 1408. The district court held that the "cause and effect test" employed by VA in 38 C.F.R. § 3.311a(d) to determine the relationship between dioxin exposure and various diseases was inconsistent both with the VA's prior practice and with the purpose of the Act. *Nehmer,* 712 F.Supp. at 1418. In reaching this conclusion, the court relied on the statement of one of the Act's principal supporters, Senator Alan Simpson, that the "[Dioxin] Act was intended to ensure that veterans 'have their exposure claims adjudicated under uniform and consistent regulations that incorporate rational scientific judgments', as opposed to the prior system, in which the claims are 'committed to the sound judgment of the VA's adjudication officers' who decide them on 'a case-by-case basis.'" *Id.* at 1422.

The statute at issue in this case, the Agent Orange Act, Pub.L. No. 102-04, 105 Stat. 11 (1991), was adopted subsequent to and informed by the issues raised in *Nehmer.* The Agent Orange Act required that the National Academy of Sciences conduct a

comprehensive review of "all the available and future evidence on the longterm health effects of exposure" to herbicides. *Haas,* 20 Vet.App. at 268. It codified, in similar form, the 1984 note to 38 U.S.C. § 354, which the Dioxin Act amended, at 38 U.S.C. § 316(a)(3), which provided:

> For the purposes of this subsection, a veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the Vietnam era and has a disease referred to in paragraph (1)(B) of this subsection shall be presumed to have been exposed during such service to an herbicide agent containing dioxin or 2,4-dichlorophenoxyacetic acid, and may be presumed to have been exposed during such service to any other chemical compound in an herbicide agent, unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service.

See Haas, 20 Vet.App. at 268.

As the majority points out, the legislative history of the Agent Orange Act is silent as to what constitutes "service in the Republic of Vietnam." However, both the legislative history and the language of the statute itself indicate the intent of Congress that a fair and independent system be established to determine the relationship between herbicide exposure and the manifestation of certain diseases. Congress was seeking to make it easier, not more difficult, for Vietnam veterans to assert claims arising from exposure to Agent Orange. In this context, it is reasonable to expect that an administrative interpretation limiting the benefits of the presumption at issue here would be based on at least some scientific evidence.

I agree with the majority that in the present case the VA's interpretation of its own regulation is entitled to controlling weight unless that interpretation is plainly erroneous or inconsistent with the regulation. *Majority Opinion,* at 1183. However, an interpretation is reasonable only if it "'*sensibly conforms to the purpose* and wording of the regulations.'" *Martin v. Occupational Safety & Health Review Comm'n,* 499 U.S. 144, 150-51, 111 S.Ct. 1171, 113 L.Ed.2d 117 (1991) (quoting *N. Indiana Pub. Serv. Co. v. Porter County Chapter of Izaak Walton League of Am., Inc.,* 423 U.S. 12, 15, 96 S.Ct. 172, 46 L.Ed.2d 156 (1975) (emphasis added)). I agree with the Veterans Court that in the absence of any scientific evidence in the record that supports a "foot on land" requirement, the VA's position is unreasonable.

Congress created the presumption at issue both because exposure to Agent Orange could not be determined by tracking troop movements and because the VA could not pinpoint which veterans were deployed at or near locations where Agent Orange was sprayed, facts which as a practical matter made it very difficult for veterans to prove their claims. Although the plain purpose of the statute is to ensure that all veterans who risked exposure have their claims adjudicated in accordance with uniform, scientifically-based standards, the "foot on land" requirement arbitrarily excludes from the benefits of the statutory presumption an identifiable group of veterans who the available evidence suggests risked exposure.

For example, the VA's interpretation grants the presumption to a veteran who served on a vessel that traveled on inland waterways but not to a veteran who served on a vessel in the waters immediately off

the coast of Vietnam, even at no greater distance from land. A veteran whose only contact with Vietnam was a one-hour stop at an airfield would have the benefit of the presumption, while a veteran who spent months on a coastal patrol boat would not. Citing to the administrative record, the Veterans Court noted that "[u]sing VA's risk-of-exposure test outlined in its June 2001 notice of final rulemaking, given the spraying of Agent Orange along the coastline and the wind borne effects of such spraying, it appears that these veterans serving on vessels in close proximity to land would have the same risk of exposure to the herbicide Agent Orange as veterans serving on adjacent land, or an even greater risk than that borne by those veterans who may have visited and set foot on land of the Republic of Vietnam only briefly." *Haas,* 20 Vet. App. at 273. The Veterans Court concluded that "[t]he Secretary has provided no rational distinction between these types of service and the Court can divine none." *Id.* Appropriately, the Veterans Court held that:

> Absent any discussion regarding the scientific studies mandated by Congress on this subject or any other evidence that contributed to VA's decision to limit the definition, the Court can only conclude that VA's asserted interpretation of this regulation is not the product of agency expertise.

Id. at 275.

Perhaps anticipating that this Court might equally be concerned with the absence of relevant scientific evidence, the VA submitted to the Court during the pendency of this appeal proposed amendments to the regulation that expressly adopt the "foot on land" test and explain the agency's rationale for the amendments. The VA acknowledges the possibility that

some veterans who were deployed immediately offshore may have been exposed to herbicides but at the same time asserts there is no evidence that the risk of such exposure was comparable to that faced by veterans who were deployed on land. The VA reaches this conclusion not on the basis of any affirmative data but by discounting the findings of the Australian study upon which Haas and others similarly situated rely. Like the VA's most recent interpretation of the regulation, the proposed amendments appear to be based on uncertainty rather than the careful scientific assessment required by the statute. Thus, despite the clarifying language, I remain convinced that the VA's interpretation is not entitled to deference.

The majority concludes that the "foot on land" rule is rational because there appears to be no clear scientific evidence defining the extent to which different groups of veterans were exposed, leaving the task of line-drawing to Congress and the VA. *Majority Opinion* at 1192. Indeed, an interpretation that excludes veterans whose only contact with the Republic of Vietnam was a high-altitude flyover or service in deep offshore waters would be perfectly sensible, as such individuals would not have had a potential risk of exposure. *See* DVA Op. Gen. Counsel Prec. 27-97 (1997) (finding that service in a deepwater vessel off the shore of Vietnam did not constitute "service in the Republic of Vietnam" under 38 U.S.C. § 101(29)(A)); DVA Op. Gen. Counsel Prec. 7-93 (1993) (finding that service in high altitude planes flying over Vietnam without any further contact with Vietnam did not constitute "service in the Republic of Vietnam" under 38 C.F.R. § 3.313). However, veterans like Haas who have asserted a reasonable claim that they may have been exposed to herbicides deserve to have such claims "adjudicated under uniform

and consistent regulations that incorporate rational scientific judgments." *See Nehmer,* 712 F.Supp. at 1422.[7] It is the VA's burden, not the veterans', to show that the VA's line-drawing was both informed by scientific evidence and consistent with the remedial purposes of the statute. Because I agree with the Veterans Court that the VA has not met that burden, I respectfully dissent.

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[7] The majority notes that the Veterans Court did not cite any specific record evidence in support of Haas's position and opines that any interpretation other than the "foot on land" test would be "unmanageably vague." *Majority Opinion* at 1195. Haas received the Vietnam Service Medal for his service in the Republic of Vietnam. As the Veterans Court pointed out and as the majority acknowledges, *id.* at 1187-88, the VA itself previously applied the presumption in cases in which a veteran received the Vietnam Service Medal or the veteran's "ship was in the vicinity of Vietnam for some significant period of time." *See Haas,* 20 Vet.App. at 271-272 (citing M21-1, part III, paragraph 4.08(k)(1)-(2)). I have no reason to doubt that the VA could develop a manageable and consistent standard that would include veterans such as Haas.

APPENDIX B

U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2007-7037

JONATHAN L. HAAS,
Claimant-Appellee,

v.

JAMES B. PEAKE, M.D., Secretary of Veterans Affairs,
Respondent-Appellant.

Stephen B. Kinnaird, Sidley Austin LLP, of Washington, DC, filed a combined petition for panel rehearing and rehearing en banc for claimant-appellee. On the petition were Barton F. Stichman and Louis J. George, National Veterans Legal Services Program, of Washington, DC.

Todd M. Hughes, Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, filed a response to the petition for respondent-appellant. With him on the response were Gregory G. Katsas, Assistant Attorney General and Jeanne E. Davidson, Director. Of counsel on the response were David J. Barrans, Deputy Assistant General Counsel, and Ethan G. Kalett, Attorney, United States Department of Veterans Affairs, of Washington, DC.

Stanley J. Panikowski, DLA Piper US LLP, of San Diego, California, for amici curiae the American Legion, et al.

John B. Wells, of Slidell, Louisiana, for amicus curiae Patricia McCulley.

Appealed from: United States Court of Appeals for Veterans Claims

Judge William A. Moorman

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2007-7037

JONATHAN L. HAAS,
Claimant-Appellee,

v.

JAMES B. PEAKE, M.D., Secretary of Veterans Affairs,
Respondent-Appellant.

Appeal from the United States Court of Appeals for Veterans Claims in 04-4091,
Judge William A. Moorman

DECIDED: October 9, 2008

ON PETITION FOR REHEARING

Before MICHEL, *Chief Judge*, BRYSON, *Circuit Judge*, and FOGEL, *District Judge*[*]

PER CURIAM.

Mr. Haas has sought rehearing of this court's decision in *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008). This supplemental opinion is principally addressed to an issue that was raised for the first time in the petition for rehearing.

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[*] Honorable Jeremy Fogel, District Judge, United States District Court for the Northern District of California, sitting by designation.

In our original opinion in this case, we held that the Department of Veterans Affairs ("DVA") had reasonably interpreted 38 U.S.C. § 1116(a)(1)(A), which governs the provision of benefits to veterans who may have been exposed to Agent Orange or other herbicides during the Vietnam War and have subsequently developed one of a specified set of diseases. The statute presumes herbicide exposure, and consequently provides for a presumption of service connection, if the veteran has one of certain specified diseases and served "in the Republic of Vietnam." *Id.* The DVA promulgated a regulation interpreting the statutory phrase "served in the Republic of Vietnam" to mean that the veteran's service must have involved "duty or visitation" in the Republic of Vietnam in order for the veteran to receive the statutory presumption of service connection. *See* 38 C.F.R. § 3.307(a)(6)(iii). The DVA has interpreted that regulation to mean that the presumption of service connection applies only to those servicemembers who physically set foot in the Republic of Vietnam; that interpretation does not include veterans, such as Mr. Haas, who served on ships that traveled outside the land borders of Vietnam and who never came ashore.

In the original appeal, Mr. Haas argued that the statutory phrase "in the Republic of Vietnam" had an unambiguous meaning that precluded the DVA from adopting its "foot-on-land" requirement. Mr. Haas contended that the statute had to include at least those servicemembers who had served in the coastal waters of Vietnam, supporting his arguments with the traditional tools of statutory interpretation–an analysis of the statute's language, structure, and legislative history. This court's opinion addressed and rejected these arguments. Instead, we agreed with the conclusion reached by the Veterans Court,

that the statute's language was ambiguous on that point. Then, like the Veterans Court, we proceeded to consider whether deference to the DVA's interpretation of the statute was appropriate under the *Chevron* line of cases. We held that it was.

In his petition for rehearing, Mr. Haas argues that any ambiguity in the meaning of section 1116 should have been resolved in his favor under the canon of statutory interpretation that ambiguity in a veterans benefits statute should be resolved in favor of the veteran. *Brown v. Gardner*, 513 U.S. 115, 117-18 (1994). Because Mr. Haas failed to raise that argument in his brief on appeal, despite the Veterans Court's ruling that the statute was ambiguous and despite otherwise extensive briefing on the issue of statutory interpretation, the argument has been waived. *Pentax v. Robison*, 135 F.3d 760, 762 (Fed. Cir. 1998) (declining to address "the government's new theory raised for the first time in its petition for rehearing"), *citing United States v. Bongiorno*, 110 F.3d 132, 133 (1st Cir. 1997) ("a party may not raise new and additional matters for the first time ir a petition for rehearing").

In any event, application of the pro-claimant canon of statutory construction in this case is not as simple as Mr. Haas's petition suggests. In cases such as this one, where the statutory language is ambiguous, this court has held that deference to the DVA's interpretation of the statute is nonetheless appropriate because this court must "take care not to invalidate otherwise reasonable agency regulations simply because they do not provide for a pro-claimant outcome in every imaginable case." *Sears v. Principi*, 349 F.3d 1326, 1331-32 (Fed. Cir. 2003). Thus, although Mr. Haas argues that the *Brown* doctrine effectively

means that the DVA is not entitled to deference if its rulemaking resolves a statutory ambiguity, this court's precedent is to the contrary. *See Nat'l Org. of Veterans' Advocates v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1378 (Fed. Cir. 2001) (stating that DVA's reasonable interpretation of an ambiguous statute is entitled to deference despite pro-claimant canon). Moreover, this case would present a practical difficulty in determining what it means for an interpretation to be "pro-claimant." While Mr. Haas contends that veterans who served offshore, but never came to land, should be covered by 38 U.S.C. § 1116(a)(1)(A), the DVA has already interpreted the statute in a pro-claimant manner by applying it to any veteran who set foot on land, even if for only a very short period of time.

Although Mr. Haas advocates defining "in the Republic of Vietnam" to include the territorial seas adjacent to the Vietnamese mainland, adopting that standard would raise new questions of interpretation and present new difficulties in application. For example, Mr. Haas's interpretation would raise the question whether the statute applies to claimants who flew through Vietnamese airspace (including the airspace above the territorial seas) but never landed in Vietnam. In addition, while Mr. Haas argues that the panel's interpretation is "absurd" because it requires the DVA "to make individualized inquiries into whether the veteran set foot on land or traversed inland waters in Vietnam," the task of determining whether a particular veteran's ship at any point crossed into the territorial seas during an ocean voyage would seemingly-be-even more difficult. Thus, even if the argument that Mr. Haas now raises had not been waived, it is by no means clear that its application would have required that the statute

cover Mr. Haas's case, or that the "pro-claimant" canon would have provided clear construction and easy application for the statute in question.

While Mr. Haas contends that the statutory reference to service "in the Republic of Vietnam" is unambiguous, we are not persuaded that the term can have only one meaning. In other contexts, as the government points out, statutory references to presence "in" a country have been understood not to include presence in the airspace or in the territorial waters surrounding the country. *See Zhang v. Slattery*, 55 F.3d 732, 754 (2d Cir. 1995) (an alien does not enter the United States until he has touched the soil). In the immigration context, Congress at one time defined the term "United States" to include "any waters . . . subject to the [U.S.] jurisdiction," but in a later version of the statute, it defined "United States" without referring to the territorial waters, and the term has subsequently been interpreted not to include the territorial waters for those purposes. *Yang v. Mauqans*, 68 F.3d 1540, 1548 (3d Cir. 1995); *see also In re Li*, 71 F. Supp. 2d 1052, 1056 (D. Haw. 1999) ("[T]he term United States has several meanings throughout the United States Code depending on the context.").

In at least one instance, the term "United States" is defined differently in different sections within the same title, in one case expressly including the territorial waters and in another not. *See* 26 U.S.C. §§ 638 ("United States" includes "subsoil of those submarine areas which are adjacent to the territorial waters of the United States"), 7701(a)(9) ("United States" includes only the States and the District of Columbia"). Thus, a simple reference to an event occurring "in the United States" (or, by analogy, to an

event occurring "in the Republic of Vietnam") does not unambiguously include an event occurring in the offshore waters. In fact, in a different statute dealing with Vietnam veterans, in which Congress intended to cover service occurring in the waters adjacent to Vietnam, it so specified. *See* Pub. L. No. 96-466, § 513(b), 94 Stat..2171, 2208 (1980), codified at 38 U.S.C. § 4107 note (referring to "veterans who during the Vietnam era served in Vietnam, in air missions over Vietnam, or in naval missions in the waters adjacent to Vietnam"); *see also* 38 U.S.C. § 101(30) (referring to veterans who "served in Mexico, on the borders thereof, or in the waters adjacent thereto"); 49 U.S.C. § 40102(a)(46) (defining "United States" to mean "the States of the United States, the District of Columbia, and the territories and possessions, including the territorial sea and the overlying airspace"). In the absence of any such reference in section 1116 to the territorial waters around Vietnam or the airspace above it, we continue to regard that statute as ambiguous on this point.

The petition for rehearing is denied.

Judge Fogel would grant the petition for rehearing and respectfully recommends that the full court grant rehearing en banc.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

No. 04-0491

JONATHAN L. HAAS,
Appellant,

V.

R. JAMES NICHOLSON,
SECRETARY OF VETERANS AFFAIRS,
Appellee.

On Appeal from the Board
of Veterans' Appeals

Argued: January 10, 2006
Decided: August 16, 2006

Louis J. George, with whom *Barton F. Stichman*, was on the brief, both of Washington, D.C., for the appellant.

William L. Puchnick, with whom *Tim S. McClain*, General Counsel; *R. Randall Campbell*, Assistant General Counsel; and *Brian B. Rippel*, Deputy Assistant General Counsel, all of Washington, D.C., were on the brief for the appellee.

Before HAGEL, MOORMAN, and LANCE, *Judges*.

MOORMAN, *Judge*: The appellant, Jonathan L. Haas, appeals a February 20, 2004, Board of Veterans' Appeals (Board) decision that denied entitlement to service connection for diabetes mellitus, with pe-

ripheral neuropathy, nephropathy, and retinopathy as a result of exposure to herbicides during his Vietnam-era service. Record (R.) at 11; *see* STEDMAN'S MEDICAL DICTIONARY 1211, 1191, 1560 (27th ed. 2000) (defining "neuropathy" as "a disease involving the cranial nerves or the peripheral or autonomic nervous system"; "nephropathy" as "any disease of the kidney"; and "retinopathy" as "non-inflammatory degenerative disease of the retina"). The Board determined that although Mr. Haas had served in the waters off the shore of the Republic of Vietnam, such service did not warrant application of the presumption of exposure to herbicides under 38 C.F.R. § 3.307(a)(6)(iii) (2004), which, the Board concluded, required a service member to set foot on land in the Republic of Vietnam. Mr. Haas did not set foot on land in the Republic of Vietnam. Thus, at issue in this appeal is whether VA's asserted regulatory definition of "service in the Republic of Vietnam" is a permissible interpretation of the authorizing statute, 38 U.S.C. § 1116(f), and whether the Board's interpretation is a reasonable interpretation of VA's regulation, 38 C.F.R. § 3.307(a)(6)(iii). The appellant, initially unrepresented, filed an informal brief. After the appellant obtained counsel in June 2005, both parties filed supplemental briefs and the appellant filed a supplemental reply brief. On January 10, 2006, the parties presented oral argument. The Court has jurisdiction pursuant to 38 U.S.C. §§ 7252 (a) and 7266(a) to review the February 2004 Board decision.

After considering the parties' briefs and oral argument, we hold that (1) 38 U.S.C. §1116(f) is not clear on its face concerning the meaning of the phrase "service in the Republic of Vietnam." Therefore, the statute is ambiguous, and the Secretary may promulgate regulations to resolve that ambiguity so long as the

regulations reasonably interpret both the language of the statute and the intent of Congress in enacting the legislation. We further hold (2) that 38 U.S.C. § 1116(f) does not by its terms limit application of the presumption of service connection for herbicide exposure to those who set foot on the soil of the Republic of Vietnam. We hold (3) that the Secretary's regulations, while a permissible exercise of his rulemaking authority, do not clearly preclude application of the presumption to a member of the Armed Forces who served aboard a ship in close proximity to the land mass of the Republic of Vietnam. We hold (4) that the provisions of the VA Adjudication Procedure Manual [hereinafter M21-1] in effect at the time the appellant filed his claim in 2001 entitled him to a presumption of service connection based upon his receipt of the Vietnam Service Medal (VSM). We hold (5) that VA's attempt to rescind that version of the M21-1 provision more favorable to the appellant was ineffective because VA did not comply with the notice and comment requirements of the Administrative Procedures Act (APA), 5 U.S.C. § 706(2)(A). And, finally, we hold (6) that if service connection for diabetes mellitus is granted upon remand, secondary service connection must be considered for the veteran's claims of peripheral neuropathy, nephropathy, and retinopathy. For these reasons, the Court will reverse the Board's determination that the appellant was not entitled to the presumption of exposure to herbicides and remand the matter for readjudication consistent with this decision.

I. FACTS

Mr. Haas served on active duty in the U.S. Navy from September 1959 to September 1960, and from May 1963 to June 1970. R. at 15. He later transferred to the Reserve component and retired from the Naval

Reserves effective July 1, 1982. R. at 304. During his entrance examination in March 1959, Mr. Haas reported a family history of diabetes, but at that time also stated that he did not have diabetes mellitus. R. at 22. The examiner noted that Mr. Haas was in good health. R. at 23. Throughout his service, Mr. Haas routinely noted a family history of diabetes during his physical examinations, but also reported that he did not suffer from diabetes mellitus. R. at 61, 71, 78, 253.

Mr. Haas was hospitalized from October 4, 1967, to October 10, 1967, at the U.S. Naval Hospital at Subic Bay, Republic of the Philippines, for an upper respiratory infection and inflammation of the right foot. R. at 124-25, 500. During his hospital stay, Mr. Haas was diagnosed as having "acute gouty arthritis with hyperuricemia," and a horseshoe kidney with left pyelocaliectasis. R. at 124; *see* DORLAND'S MEDICAL DICTIONARY 800, 1392 (27th ed. 1988) (defining "hyperuricemia" as "excess of uric acid or urates in the blood; it is a prerequisite for the development of gout and may lead to renal disease"; and "pyelocaliectasis" as "dilation of the kidney pelvis and calices"). The results of a glucose test taken at that time were abnormal. R. at 124, 127.

In an August 1968 service medical report, an examiner reported that Mr. Haas would have to undergo further testing to rule out diabetes mellitus. The examiner further noted that the glucose tolerance test conducted in October 1967 was "mildly abnormal but not significantly and may be a reflection of [Mr. Haas's] obesity." R. at 140. In December 1972, Mr. Haas was found to be physically qualified to continue service. Laboratory tests conducted at that time revealed normal albumin and sugar levels, and normal serology reports. R. at 192. He was also deemed physically

qualified for active-duty-for-training service after physical examinations in May 1973, February 1975, August 1976, and September 1977. R. at 200, 238, 257. He was disqualified from active-duty-for-training service in September 1978 after failing to meet weight requirements. R. at 273. In February 1981, Mr. Haas requested a transfer to the "retired list without pay"; his request was granted and deemed effective July 28, 1981. R. at 298. On July 19, 1982, he was transferred to the Retired Reserves, effective July 1, 1982. R. at 304.

In August 2001, Mr. Haas submitted an application for VA disability compensation, requesting service connection for diabetes mellitus, peripheral neuropathy, and loss of eyesight, resulting from "exposure to [A]gent [O]range/radioactive materials" during his service. R. at 313-21. He indicated that these disabilities first manifested sometime in 1980 and that he had received treatment for these conditions at the VA medical center in Phoenix, Arizona. *Id.*

A VA regional office (RO) sent Mr. Haas a letter in August 2001 informing him that in order for the RO to apply the presumption of service connection for diabetes mellitus due to exposure to herbicides during service, he must "have physically served or visited in the Republic of Vietnam, including service in the waters offshore if the conditions of service involved duty or visitation in Vietnam. This means the ship must have come to port in the [Republic of Vietnam] and you disembarked." R. at 323-27. In response to this notice, Mr. Haas took exception to the criteria for "service in the Republic of Vietnam." R. at 329. He reported that he had served on an "ammunition ship and [had] resupplied boats and ships patrolling the coastal water of Vietnam with ammunition, food, stores

and fuel. Ammunition ships and tankers did not enter the ports of Vietnam due to the risks of explosion due to enemy fire or sabotage." *Id.* He further noted that he had received four VSMs, and therefore, "served in the Republic of Vietnam without the 'ship going into port in [the Republic of Vietnam] and . . . disembarking.'" *Id.* In September 2001, he contended that "service in the Republic of Vietnam," as defined by 38 C.F.R. § 3.307(a)(6)(iii), must be read to include service in the waters offshore. R. at 331-32. In May 2002, the Phoenix, Arizona, RO denied presumptive service connection for diabetes mellitus with peripheral neuropathy, nephropathy, and retinopathy. R. at 455-60.

In June 2002, Mr. Haas filed a Notice of Disagreement (NOD), and in December 2002, the RO issued a Statement of the Case (SOC), maintaining its denial of his claim on the basis that Mr. Haas did not have service in the Republic of Vietnam in accordance with the definition set forth in VA General Counsel Precedent Opinion (G.C. Prec.) 27-97 (July 23, 1997). R. at 521-39 (the Court notes that both the RO decision and the SOC refer to a VA General Counsel precedent opinion that was published in September 1996; however, the only VA General Counsel precedent opinions of record regarding the issue of what constitutes service in the Republic of Vietnam are G.C. Prec. 7-93 (1993) and G.C. Prec. 27-97 (1997)). Mr. Haas filed an appeal with the Board in January 2003, asserting that VA's interpretation of "service in the Republic of Vietnam," was "arbitrary and capricious, and . . . contrary to regulation and law." R. at 543.

In July 2003, Mr. Haas testified before a member of the Board. R. at 560-71. Mr. Haas stated that during his tour aboard the U.S.S. *Mount Katmai*, he often saw large clouds of chemicals being dropped by aircraft over

the forests. He further stated: "[T]hese large clouds would drift out over the water because of the prevailing offshore winds, and they would engulf ships, my ship in particular. Now you could see the chemicals, you could taste them, smell them, and they landed on your skin." R. at 562. Mr. Haas reported that his exposure occurred in 1966 or 1967. R. at 563. He noted that he was on an ammunition ship about "420, [4]25 feet [long][1]" for approximately 20 days at a time, for eight months during each of his two deployments. R. at 564-65. He testified that he would have to navigate in close proximity to the shoreline to deliver supplies because the "boats that were doing the patrolling could not leave the stations more than a certain amount of time[.] . . . [T]hey couldn't steam out 5 miles to pick up supplies." R. at 565. The Board subsequently issued the decision on appeal here, denying presumptive service connection for diabetes mellitus on the basis that Mr. Haas never set foot on land in the Republic of Vietnam. The Board did not evaluate Mr. Haas's claim under the direct service-connection provisions of VA regulations. R. at 1-16.

II. CONTENTIONS ON APPEAL

On appeal, the appellant makes three assertions of error. First, he contends that VA's regulatory definition of what constitutes "service in the Republic of Vietnam" contradicts the plain meaning of the authorizing statute, 38 U.S.C. § 1116(f). Second, he asserts that if the Court finds the language of 38 U.S.C. § 1116(f) to be ambiguous, VA's gap-filling regulation, 38 C.F.R. § 3.307(a)(6)(iii), is not a permissible inter-

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[1] *See* NavSource Online: Service Ship Photo Archive, AE-16 *Mount Katmai*, *at* http://www.navsource.org/archives/09 /0516.htm (last visited Aug. 10, 2006) (noting the length of the U.S.S. *Mount Katmai* as 459 feet).

pretation of what may constitute "service in the Republic of Vietnam." Finally, he asserts that VA's M21-1 provisions addressing the application of the presumption of service connection for herbicide exposure are substantive in nature and have the force and effect of law, and that VA committed error by retroactively applying the February 2002 version of M21-1, paragraph 4.24(g). As a result, the appellant asserts that the February 2004 Board decision should be reversed.

The Secretary first asserts that the term "Republic of Vietnam" contained in 38 U.S.C. § 1116(f) is not ambiguous given the language and the context within which the statute was enacted; however, if the Court concludes that the term is ambiguous, then VA's regulatory definition of what constitutes service in the Republic of Vietnam is a permissible and reasonable interpretation of that language. Second, he maintains that the M21-1 provisions at issue in this case are interpretive rather than substantive in nature; thus, they do not have the force and effect of law and do not dictate an award of presumptive service connection in this case. The Secretary asserts that if the Court finds that the M21-1 provisions are substantive, however, that under any version of the M21-1 provisions addressing presumptive service connection for herbicide exposure, the appellant's own statements are sufficient to rebut the presumption. Finally, the Secretary concedes that a remand is necessary for the Board to consider entitlement to service connection for diabetes mellitus on a direct service-connection basis.

III. ANALYSIS

A. Standard of Review

At issue in this case is the meaning of the statute and regulations governing presumptive exposure to certain herbicide agents as the result of service in the

Republic of Vietnam and what constitutes "service in the Republic of Vietnam."[2] These are questions of law that the Court reviews de novo. In deciding these issues, the Court must first analyze the language of the authorizing statute and determine "whether Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *see* 38 U.S.C. § 7261(a) (providing the Court's scope of review); *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 409 (1993); *see also Trilles v. West*, 13 Vet.App. 314, 321 (2000) (en banc). If the text of the statute speaks unambiguously directly to the question at issue, then "that is the end of the matter; for the [C]ourt, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43; *see also Gardner v. Derwinski*, 1 Vet.App. 584, 586-87 (1991) (addressing principles of statutory construction and noting that, where a statute has a plain meaning, the Court shall give effect to that meaning), *aff'd sub nom. Brown v. Gardner*, 513 U.S. 115 (1994); *see also Meeks v. West*, 12 Vet.App. 352, 354 (1999) ("'[E]ach part or

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[2] The Court notes that in our recent decision in *Pratt v. Nicholson* , __ Vet.App. __, __, No. 04-0451, slip op. at 5 (Aug. 11, 2006), we held that the plain language of the phrase "in the Republic of Vietnam," as used in 38 U.S.C. § 1831(2), was sufficiently clear to resolve the question presented. Accordingly, we rejected the appellant's claim that the veteran's service in the San Diego, California, area qualified the appellant for benefits under 38 U.S.C. § 1805. *Id.* Our conclusion in this case that the statutory language is ambiguous as to service in the waters off the coast of Vietnam is not in conflict with *Pratt*. Rather, these two cases illustrate the principle that statutory ambiguity is not an absolute conclusion, but is a case-by-case determination as to whether the language answers the particular question presented. Hence, statutory language that plainly answers one question may still be ambiguous when applied to another.

section [of a statute] should be construed in connection with every other part or section so as to produce a harmonious whole.'" (quoting 2A N. SINGER, SUTHERLAND ON STATUTORY CONSTRUCTION § 46.01 (5th ed. 1992))). If, however, the statute is silent as to the matter at issue, VA's attempt at filling that gap "will generally be sustained as long as it reflects a permissible construction of the statute." *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 123 (1987); *see Chevron*, 467 U.S. at 842-43; *Felton v. Brown*, 4 Vet.App. 363, 370 (1993).

B. Statutory Provision

1. Plain Language of 38 U.S.C. § 1116(f)

Section 1116(f), title 38, of the U.S. Code, provides:

> For purposes of establishing service connection for a disability or death resulting from exposure to a herbicide agent, including a presumption of service-connection under this section, a veteran who, during active military, naval, or air service, *served in the Republic of Vietnam* during the period beginning on January 9, 1962, and ending on May 7, 1975, shall be presumed to have been exposed during such service to an herbicide agent containing dioxin . . . and may be presumed to have been exposed during such service to any other chemical compound in an herbicide agent, unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service.

Id. (emphasis added). The precise question at issue in this case is the meaning of the phrase "served in the Republic of Vietnam." There are many ways in which to interpret the boundaries of a sovereign nation such as the former Republic of Vietnam, which is now part of

the Socialist Republic of Vietnam.[3] For instance, such boundaries can be defined solely by the mainland geographic area. *See* CIA WORLD FACTBOOK, Vietnam, *available at* www.cia.gov/cia/publications/factbook /geos/vm.html (last visited Mar. 3, 2006) (noting the land boundaries of Vietnam as 4,369 kilometers). The present boundaries of the Republic of Vietnam can also be construed to include the surrounding islands it controls in the Hoang Sa and Truong Sa archipelagos. *See* Embassy of the Socialist Republic of Vietnam in the United States of America, Maps of Vietnam, *at* http://www. vietnamembassy-usa.org/learn_about_ vietnam/geography/maps (last accessed Mar. 2, 2006). Using international law principles, the Republic of Vietnam could be defined further to include its territorial seas, extending 12 nautical miles from its coastline, or even as far as its exclusive economic zone, extending its boundary 200 nautical miles beyond the coastline, and further to include its airspace. *See* United Nations Convention on the Law of the Sea, Part II, Dec. 10, 1982, *at* http://www.un.org/Depts/los /convention_agree-

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[3] In 1954, pursuant to the Geneva Agreement on Vietnam, the country was temporarily partitioned into North and South Vietnam at the 17th parallel; the northern part was referred to as the "Democratic Republic of Vietnam," with its capital in Hanoi, and the southern part was known as the Republic of Vietnam, with its capital in Saigon. In the 1960s, U.S. military troops were sent to South Vietnam to support the Saigon government in maintaining its independence from North Vietnam. In 1973, after signing the Paris Agreement, the United States began to withdraw its troops, and in the spring of 1975, the northern and southern parts of Vietnam were unified. On April 25, 1976, the country, now including both the northern and southern parts of the territory, was renamed the Socialist Republic of Vietnam. *See* Embassy of the Socialist Republic of Vietnam in the United States of America, History of Vietnam, *at* http://www.vietnamembassy-usa.org/ learn_about _vietnam/history (last accessed Mar. 20, 2006).

ments/texts /unclos/closindx.htm (last visited Mar. 2, 2006) ("The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil."); *see also* United Nations Convention on the Law of the Sea, Participants, at http://untreaty.un.org/ENGLISH/bible/ englishinternetbible/ partI/chapterXXI/treaty6.asp (last visited Mar. 2, 2006) (noting that the Republic of Vietnam signed the Convention on Dec. 10, 1982, and ratified it on July 25, 1994); *cf.* United Nations Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, Participants, *at* http://untreaty.un.org/ENGLISH/bible /englishinternetbible /partI/chapter XXI/treaty1.asp (last accessed June 30, 2006) (reporting that the United States signed this treaty on Sept.15, 1958, and ratified the treaty on Apr. 12, 1961, thus adopting the 12 nautical mile standard for its territorial seas, and the 200 nautical mile standard for its contiguous zone).

The appellant argues that the text of this statute is clear, that the phrase "Republic of Vietnam" must be read, in accordance with Presidential Proclamation 5928, 54 Fed. Reg. 777 (Jan. 9, 1989) to include both the nation's land mass and territorial seas. Appellant's Supplemental Brief at 6 (noting that the territorial sea of a sovereign nation extends 12 nautical miles). The appellant argues that the Court must presume that when Congress enacted section 1116(f), it knew the "widely accepted territorial definition of a sovereign country," and that by using the phrase "in the Republic of Vietnam," it intended to adopt that definition. *Id.* In response, the Secretary maintains that because the

regulation first defining "service in the Republic of Vietnam" (38 C.F.R. § 3.311a(a)(1) (1985)), predated the enactment of 38 U.S.C. § 1116(f), the Court must presume that Congress was aware of VA's then-extant regulatory provision, and therefore, it is rather the agency's regulatory definition that Congress must have intended to adopt.

The Court notes, however, that at the time section 1116(f) was enacted in 1991, there were two extant VA regulations defining "service in the Republic of Vietnam." *Compare* 38 C.F.R. § 3.311a(a)(1) (1985) (defining "service in the Republic of Vietnam" as "includ[ing] service in the waters offshore and service in other locations, if the conditions of service involved duty or visitation in the Republic of Vietnam"), *with* 38 C.F.R. § 3.313 (1990) (entitled "Claims based on service in Vietnam" and defining "service in the Republic of Vietnam" as including "service in the waters offshore, or service in other locations if the conditions of service involved duty or visitation in Vietnam"). Based on the different syntax and punctuation used in these regulations supposedly using the same definition for Vietnam-era service, it is easy to see how one could interpret and apply this definition differently in practice. For example, based on the placement of the comma in § 3.311a(a)(1) (1985), the clause "if the conditions of service involved duty or visitation in the Republic of Vietnam" can be read to modify both "service in the waters offshore" and "service in other locations," although even that interpretation is not certain to flow from the language and syntax. The same clause, however, in § 3.313 "Claims based on service in Vietnam," based on the comma placement, can be read to modify only "service in other locations;" thus, service in the waters offshore could constitute service in the Republic of Vietnam regardless of

whether the veteran visited or had duty on land in Vietnam. It is further unclear what the reader should conclude from the use of "and" after "waters offshore" in § 3.311a(a)(1), and the use of "or" after "waters offshore" in § 3.313. The Court cannot conclude, therefore, based on these varying definitions, that Congress intended to adopt either the international law definition as the appellant contends, or, as the Secretary asserts, the regulatory definitions extant at the time that the Agent Orange Act of 1991 was enacted. Thus, the Court cannot conclude that the text of the statute is clear on its face. *See Chevron, supra.*

2. *Legislative History and Context of 38 U.S.C. § 1116(f)*

We must next look to the legislative history of this statute to discern whether Congress otherwise specified its intent regarding the meaning of the phrase "service in the Republic of Vietnam." *See Blum v. Stenson*, 465 U.S. 886, 896 (1984) (noting that discerning Congress's intent can be accomplished by reviewing the legislative history of a statute). The meaning of the statute as a whole also warrants scrutiny. *See Moreau v. Brown*, 9 Vet.App. 389, 396 (1996) ("[I]t is fundamental that sections of a statute should not be read in isolation from the context of the whole act, and that in fulfilling our responsibility in interpreting legislation, 'we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy.'" (quoting *Richards v. United States*, 369 U.S. 1, 11 (1962))); *see also Cottle v. Principi*, 14 Vet.App. 329, 334 (2001); *Meeks*, 12 Vet.App. at 354; *Talley v. Derwinski*, 2 Vet.App. 282, 286 (1992). As noted above, after such review, if the intent of Congress is unclear, then we must defer to VA's construction of the statutory term, if

it is a permissible interpretation. *See Chevron, supra*; *see also Barnhart v. Walton*, 535 U.S. 212, 217-18 (2002).

Although current section 1116(f) was not enacted until 1991, in 1983 Congress first addressed the issue of creating a statutory presumption of service connection for diseases resulting from Agent Orange exposure. *See* Agent Orange Act of 1991, Pub. L. No. 102-4, 105 Stat. 11 (codifying current section 1116(f) at 38 U.S.C. § 316(a)(3)); *see also* H.R. REP. NO. 98-592 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4449 (detailing the history of H.R. 1961, the precursor of Public Law 98-542, the Veterans' Dioxin and Radiation Compensation Standards Act). In March 1983, H.R. 1961 was introduced in an effort to "authorize temporary monetary benefits pending the results and receipt of the epidemiological study mandated by Public Law 96-151 for Vietnam veterans who suffer from soft-tissue sarcoma, porphyria cutanea tarda . . . and chloracne." 1984 U.S.C.C.A.N. 4449. The 1983 bill, in its original form, would have "provid[ed] a statutory presumption of service-connection for *any* veteran who *served in Southeast Asia during the Vietnam era* and who later is shown to have one of the conditions identified in the bill." *Id.* (emphasis added). In further reporting the results of its previous oversight investigations, the U.S. House Committee on Veterans' Affairs (hereinafter the Committee) recognized that the main issues that still needed to be addressed were not the toxicity of the dioxin contained in Agent Orange, but rather "how much exposure to the dioxin was experienced by Vietnam veterans, how much exposure can be expected to produce long-term health effects, and at what rate, or frequency, if any, are these effects being experienced by veterans who served in Southeast Asia." *Id.* at 4451. Until these questions could be answered by the various

studies that Congress had mandated in Public Laws 96-151 and 97-72, the Committee proposed the temporary payments set forth in H.R. 1961. *Id.* at 4453.

In October 1984, Congress enacted the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Public Law 98-542, based on H.R. 1961. In this act, Congress recognized that there was scientific and medical uncertainty regarding the long-term effects of exposure to Agent Orange, and noted that there was evidence that the diseases chloracne, porphyria cutanea tarda, and soft tissue sarcoma were associated with herbicide exposure. *See* Pub. L. No. 98-542, §2(2), (5), 98 Stat. 2725 (1984). Further observing that VA had not promulgated regulations setting forth guidelines for the adjudication of claims based on exposure to Agent Orange, and noting the unique differences between these types of claims and claims for service connection based on an injury in service, Congress then authorized VA to "prescribe regulations to establish guidelines and (where appropriate) standards and criteria for the resolution of claims for benefits . . . [where] the claim of service connection is based on a veteran's exposure during *service . . . in the Republic of Vietnam* during the Vietnam era to a herbicide containing dioxin." Pub. L. No. 98-542, §5(a)(1)(A), 98 Stat. 2727 (1984) (emphasis added). Finally, the act amended 38 U.S.C. § 354, adding note (a)(1) to allow for "interim benefits for disability or death in certain cases." This note provided:

> In the case of a veteran—
>
> > (A) who served in the active military, naval, or air service *in the Republic of Vietnam* during the Vietnam era; and

> (B) who has a disease described in subsection (b) that became manifest within one year after the date of the veteran's most recent departure from the Republic of Vietnam during that service, the Administrator shall (except as provided in subsection (C)) pay a monthly disability benefit to the veteran in accordance with this section.

Pub. L. No. 98-542, §9, 98 Stat. 2732 (1984) (emphasis added).

Although the original bill, H.R. 1961, would have provided the temporary payment to Vietnam-era veterans who served in "Southeast Asia," as noted above, in the provision ultimately passed by Congress, that term was replaced with "Republic of Vietnam." *Compare* H.R. REP. NO. 98-592, *as reprinted in* 1984 U.S.C.C.A.N. 4449 (noting that the statutory presumption would be afforded to veterans "who served in Southeast Asia during the Vietnam era"), *with* Pub. L. No. 98-542, § 9, 98 Stat. 2732 (1984). There is no explanation in the 1984 Committee Report for this change in the text.

In addition, the 1984 act focused mainly on the promulgation of VA regulations, to include the requirement that the regulations be promulgated through the public review and comment process dictated by the APA, 5 U.S.C. § 553, and that the regulations include "a requirement that a claimant filing a claim based upon . . . exposure to a herbicide containing dioxin . . . may not be required to produce evidence substantiating the veteran's exposure during active military, naval, or air service if the information in the veteran's service records and other records of the Department of Defense is not inconsistent with the claim that the veteran was present where and when the claimed exposure occurred." Pub. L. No. 98-542, §5(b)(3)(B), 98 Stat. 2729

(1984). As related to any regulation promulgated pursuant to this act, Congress explicitly adopted the definitions for "Vietnam era," "veteran," "service-connected," and "active military, naval, or air service," as set forth in 38 U.S.C. § 101. Pub. L. No. 98-542, § 9(g), 98 Stat. 2733 (1984). The act, however, did not define what constitutes "service in the Republic of Vietnam." *Id.*

In order for the Court to trace further the legislative history of 38 U.S.C. § 1116(f), it is necessary to briefly discuss the subsequent regulatory actions of the Secretary following the 1984 act and other subsequent procedural history that prompted further legislative action on this issue. Pursuant to the 1984 congressional mandate, in April 1985 VA proposed 38 C.F.R. § 3.311a, "Dioxin Rule," which became effective on September 25, 1985. This regulation, among other things, defined "service in the Republic of Vietnam" as "includ[ing] service in the waters offshore and service in other locations, if the conditions of service involved duty or visitation in the Republic of Vietnam." *See* 50 Fed. Reg. 34,452, 34,458 (Aug. 26, 1985). In its notice of proposed rulemaking, VA recognized that more than 2.4 million U.S. military personnel served in Vietnam, and although it could not pinpoint exactly who may have been exposed to Agent Orange, it acknowledged that many of these individuals were deployed in or near locations where Agent Orange was sprayed. *See* 50 Fed. Reg. 15,848, 15,849 (Apr. 22, 1985). Thus, VA stated that "service in the Republic of Vietnam" would "encompass services elsewhere if the person concerned actually was in the Republic of Vietnam, however briefly." *Id.* The notice contained no further indication as to what constituted "actually . . . in the Republic of Vietnam." *Id.* VA issued the final regulation without change, noting further that the presumption was based

on the extreme difficulty of tracking troop movements to determine exactly who may have been exposed to Agent Orange. *See* 50 Fed. Reg. 34,452, 34,455 (Aug. 26, 1985).

In February 1987, a group of Vietnam-era veterans and surviving spouses filed a class action suit in the United States District Court, Northern District of California, alleging that this final regulation was invalid because it not only violated provisions of the 1984 act, but in the process of promulgating the regulation, VA also violated provisions of the APA, 5 U.S.C. §§ 701-706, and the fifth amendment to the U.S. Constitution. *See Nehmer v. U.S. Veterans' Administration*, 712 F. Supp. 1404, 1410-11 (N.D. Cal. 1989) (noting that the court could exercise jurisdiction because the action was filed prior to the enactment of the Veteran's Judicial Review Act, which vested jurisdiction over statutory challenges to VA rulemaking filed after September 1, 1989, with the Federal Circuit). The court held that the "cause and effect test" employed by VA in 38 C.F.R. § 3.311a(d) to determine the relationship between dioxin exposure and diseases was inconsistent with both VA's prior practice and the purpose of the 1984 act. *Id.* at 1418. The court also held that the 1984 act required VA to apply the benefit of the doubt doctrine in the aggregate rulemaking process. In reaching this conclusion, the court relied on the statement of Senator Simpson, in which he asserted that the "[1984] Act was intended to ensure that veterans 'have their exposure claims adjudicated under uniform and consistent regulations that incorporate rational scientific judgments, as opposed to the prior system, in which the claims are 'committed to the sound judgment of the VA's adjudication officers' who decide them on 'a case-by-case basis.'" *Id.* at 1422 (citing statement of Senator Simpson, 130 CONG. REC. S13591 (daily ed. Oct. 4,

1984); *cf. King v. St. Vincent's Hosp.*, 502 U.S. 215 (1991) (holding that veterans benefits statutes should be construed liberally for their beneficiaries). In its conclusion, the court stated that "[t]he Administrator both imposed an impermissibly demanding test for granting service connection for various diseases *and* refused to give veterans the benefit of the doubt in meeting that standard." *Nehmer*, 712 F. Supp. at 1423. The court thus invalidated 38 C.F.R. §3.311a(d), the portion of the regulation that denied service connection for all diseases other than chloracne, and voided all decisions denying benefits under this regulation. *Id.*

Following VA's regulatory action and the U.S. District Court's decision in *Nehmer*, Congress ultimately enacted the Agent Orange Act of 1991. *See* Agent Orange Act of 1991, Pub. L. No. 102-4, 105 Stat. 11; *see also* Statements on Introduced Bills and Joint Resolutions, Veterans' Agent Orange Exposure and Vietnam Service Benefits Act of 1989, 135 CONG. REC. S6413 (daily ed. June 8, 1989) (noting that a proposed bill, S. 1153, establishing presumptive service connection based on exposure to Agent Orange, was designed to "complement the efforts Secretary Derwinski will be making through the new Agent Orange Regulations . . . . This process will allow the VA's regulatory procedure to go forward and give NHL [non-Hodgkin's lymphoma] and STS [soft-tissue sarcoma] victims the benefit of the doubt in the meantime."); Amendment to S. 13, The Veteran's Benefits and Health Care Act of 1989, 135 CONG. REC. S12,628 (daily ed. Oct. 4, 1989). As stated by Representative Dan Burton, this legislation served to codify a prior VA administrative decision that deemed three diseases service connected for compensation purposes. *See* 137 CONG. REC. E390-03 (daily ed. Jan. 29, 1991) (statement of Rep. Burton). The 1991 act also required that

the National Academy of Sciences conduct a comprehensive review of "all the available and future evidence on the long-term health effects of exposure" to herbicides, and that the Secretary, upon receipt of this review, determine whether "any further presumptions for any disease should be granted." *Id.*

Although the 1991 act focused mainly on addressing the issues raised in *Nehmer*, *supra*, it also codified, in similar form, the 1984 note to 38 U.S.C. § 354 at 38 U.S.C. § 316(a)(3), which provided:

> For the purposes of this subsection, a veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the Vietnam era and has a disease referred to in paragraph (1)(B) of this subsection shall be presumed to have been exposed during such service to an herbicide agent containing dioxin or 2,4-dichlorophenoxyacetic acid, and may be presumed to have been exposed during such service to any other chemical compound in an herbicide agent, unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service.

Pub. L. No. 102-4, §2, 105 Stat. 111; *see also* Veterans Education and Benefits Expansion Act of 2001, Pub. L. No.107-103, § 201(c)(1)(A) (redesignating provision 38 U.S.C. § 316(a)(3) as 38 U.S.C. § 1116(f)). The legislative history of the 1991 act, however, is silent concerning what constitutes "service in the Republic of Vietnam." Rather, it indicates Congress's intent to ensure that a fair and independent system was established to determine the relationship between herbicide exposure and the manifestation of certain diseases. Thus, after reviewing the plain text of the statute, in concert with the legislative history of both the 1984 act and the Agent Orange Act of 1991, the

Court cannot conclude that the intent of Congress is so clear as to require either an interpretation that "service in the Republic of Vietnam" is limited solely to Vietnam's mainland, or that such service necessarily includes service in Vietnam's territorial seas.

C. VA's Regulatory Provisions

1. Chevron *Deference*

The Secretary has attempted to resolve the ambiguity in 38 U.S.C. § 1116(f) through regulation 38 C.F.R. § 3.307(a)(6)(iii), as interpreted in subsequent VA General Counsel Precedent opinions 7-93 and 27-97, and M21-1 provisions, dated from 1990. Given the ambiguity of the statute, VA is permitted to issue regulations in order to resolve the ambiguity, subject, however, to the requirement that such regulations express a permissible interpretation of the statute.[4] If the regulations meet this test, they will be afforded *Chevron* deference. Based on the following, the Court concludes that the regulation, on its face, is ambiguous regarding whether service on the land in Vietnam is required for the presumption to apply.

In defining "service in the Republic of Vietnam" before the Court, the Secretary has used interchangeably the definitions in 38 C.F.R. § 3.307(a)(6)(iii) and

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[4] It is noteworthy that the U.S. Supreme Court's decision in *Brown v. Gardner*, 513 U.S. at 118, does not appear to apply in this instance. In *Terry v. Principi*, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) observed that the principle enunciated in *Brown* is "a canon of statutory construction that requires that resolution of interpretive doubt arising from statutory language be resolved in favor of the veteran." 340 F.3d 1378, 1384 (Fed. Cir. 2003). The Federal Circuit then concluded that the canon "does not affect the determination of whether an agency's regulation is a permissible construction of a statute." *Id.*

§ 3.313(a), thus implying that there is no difference in the meaning of this definition as it appears in the separate regulations. *Compare* Secretary's Brief (Sec'y Br.) at 13 (relying on the construction of §3.313 to define service in the context of applying the presumption of exposure to herbicides), *with* Secretary's Supplemental Brief (Sec'y Suppl. Br.) at 22 (relying on §3.307(a)(6)(iii)); *see also Auer v. Robbins*, 519 U.S. 452, 461-62 (1997) (relying on litigation documents to determine agency's interpretation). Upon reviewing the construction of these two provisions, however, the Court cannot conclude the same. As noted above, for example, 38 C.F.R. §3.307(a)(6)(iii) defines "service in the Republic of Vietnam" as including "service in the waters offshore *and* service in other locations if the conditions of service involved duty or visitation in the republic of Vietnam," while 38 C.F.R. § 3.313, which is entitled "Claims based on service in Vietnam," defines such service as "service in the waters offshore, *or* service in other locations if the conditions of service involved duty or visitation in Vietnam." (emphasis added). Although similar wording is used in these regulations, the construction of both definitions, notably the comma placement in §3.313 and the use of different conjunctions, is quite different. When read without the aid of the Secretary's assertion as to the underlying meaning of this phrase, it is not clear what kind of service is meant to be included for application of the presumption of exposure to herbicides. The varying constructions of this phrase only serve to heighten the ambiguity of the regulatory language. Thus, based on the construction of the regulations, the Court concludes that the Secretary merely has replaced statutory ambiguity with regulatory ambiguity and *Chevron* deference will not be afforded. *See Smith (Ellis) v. Nicholson*, 451 F.3d 1344, 1350 (Fed. Cir. 2006).

In situations such as this, VA's interpretation of its own regulation "becomes 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Smith (Ellis)*, 451 F.3d at 1350 (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) and maintaining that such deference is afforded even in cases where the agency announces its interpretation in litigation documents). Further, as the U.S. Supreme Court noted in *Martin v. Occupational Safety and Health Review Commission*, 499 U.S. 144, 150-51 (1991), where "'the meaning of [regulatory] language is not free from doubt,' the [Court] should give effect to [VA's] interpretation so long as it is 'reasonable,' that is, so long as the interpretation 'sensibly conforms to the purpose and the wording of the regulations.'" *Id.* (quoting *Ehlert v. United States*, 402 U.S. 99, 105 (1971) and *N. Ind. Pub. Serv. Co. v. Porter County Chapter of Izaak Walton League of Am., Inc.*, 423 U.S. 12, 15 (1975)). In determining whether VA's interpretation of its regulation is "reasonable," the Court will consider, among other things, the "timing and consistency of the agency's interpretation," *Batterton v. Francis*, 432 U.S. 416, 425-26 n.9 (1977); *see INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (maintaining that an agency's interpretation of a statute or regulation that conflicts with a prior interpretation is "'entitled to considerably less deference' than a consistently held agency view" (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981))); the "thoroughness evident in its consideration, [and] the validity of its reasoning," *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) ("[R]ulings, interpretations, and opinions . . . while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment . . . properly resort[ed] [to] for guidance. The weight of such a judgment . . .

will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.")*.* For the following reasons, the Court concludes the interpretation offered to the Court by VA of its regulatory definition of what constitutes "service in the Republic of Vietnam" is inconsistent with prior, consistently held agency views, plainly erroneous in light of its interpretation of legislative history, and unreasonable as an interpretation of VA's own regulations. Thus, the current interpretation will not be afforded deference. *See Cardoza-Fonseca*, *Bowles*, and *Skidmore*, all *supra; see also Smith (Ellis), supra.*

2. Inconsistent Regulatory Interpretation

As noted earlier, an "agency's interpretation of a statute or regulation that conflicts with a prior interpretation is 'entitled to considerably less deference' than a consistently held agency view." *Cardoza-Fonseca,* 480 U.S. at 446 n.30; *see also Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 412 n.11 (1979). After reviewing VA's M21-1 provisions, it is clear to the Court that the most recent interpretation of § 3.307(a)(6)(iii), that service in Vietnam requires that a veteran actually set foot on land, conflicts with VA's past policy in determining "service in the Republic of Vietnam" for application of the presumption of exposure to herbicides.

In November 1991, VA issued M21-1, part III, paragraph 4.08(k)(1)-(2). This provision stated:

> (1) It may be necessary to determine if a veteran had "service in Vietnam" in connection with claims for service connection for non-Hodgkins lymphoma, soft-tissue sarcoma and chloracne. . . . In the absence of contradictory evidence, "service in

> Vietnam" will be conceded if the records shows [sic] that the veteran received the Vietnam Service Medal.
>
> (2) If a veteran who did not receive the Vietnam Service Medal claims service connection for non-Hodgkin's lymphoma, soft-tissue sarcoma or chloracne and alleges service on a ship in the waters offshore Vietnam, review the record for evidence that the ship was in the vicinity of Vietnam for some significant period of time (i.e., more than just in transit through the area). If the veteran cannot produce evidence that the ship was in the waters offshore Vietnam, contact the Compensation and Pension Service Projects Staff. Be prepared to furnish the name of the ship, the number of the ship, and the dates that it is alleged to have been in the waters offshore Vietnam. Central Office will attempt to obtain confirmation from the Department of Defense.

Id.

It appears to the Court that this provision remained in effect throughout the promulgation and even after the final publication of 38 C.F.R. § 3.307(a)(6)(iii), which thus concedes the application of the presumption based upon the mere receipt of the VSM, without any additional proof that the veteran actually set foot on land in the Republic of Vietnam. Furthermore, even in the absence of a veteran's receipt of the VSM, this provision requires VA adjudicators to review the record for evidence that the veteran's "ship was in the vicinity of Vietnam for some significant period of time." Based on this language, it cannot be concluded, as the Secretary would urge us to conclude, that VA's longstanding interpretation of what constitutes service in Vietnam has been to exclude service in the waters

offshore unless the veteran had duty or visitation on land. If that were the case, there would be no requirement to examine whether a ship "was in the vicinity of Vietnam for some significant period of time" because such evidence would be irrelevant under the interpretation that VA now urges on the Court. *See* Appellee's Opposed Motion to Correct Mistake at Oral Argument Dated January 10, 2006, at 2 (asserting that service in Vietnam would never be conceded under any provision of the M21-1 if there was "evidence to the contrary," including the veteran's own statements that he never set foot on land in the Republic of Vietnam); *see also* M21-1, pt. III, para. 4.08(k)(1)-(2) (Nov. 8, 1991); M21-1, pt. III, para. 4.24(g)(1)-(2), change 23 (Oct. 6, 1993); M21-1, pt. III, para. 4.24(g)(1)-(2), change 41 (July 12, 1995); M21-1, pt. III, para. 4.24(g)(1)-(2), change 76 (June 1, 1999).

Furthermore, this provision was amended in 1995, reflecting the holding of a 1993 VA General Counsel precedent opinion in which VA determined that individuals who participated only in high altitude flights over the Republic of Vietnam and received the VSM as a result of such service would not be entitled to the presumption. *See* G.C. Prec. 7-93 (maintaining that these veterans were excluded from the scope of the regulatory definition because they did not share the same experiences as those who served in Vietnam *or in the waters offshore of Vietnam*). This version of M21-1, part III, paragraph 4.24(g), still allowed for application of the presumption based upon the receipt of the VSM and also required VA to conduct additional development in cases in which the veteran served on a ship in the waters offshore of Vietnam but did not receive the VSM, thus allowing for the inference that the presumption would be applicable in cases where a veteran served in the waters offshore of Vietnam and

received a VSM for such service, but never had duty or visited on land in the Republic of Vietnam as the Secretary now asserts is required. *Compare* M21-1, pt. III, para. 4.24(g)(1)-(2), change 41 (July 12, 1995) (noting that this version was published after the publication of § 3.307(a)(6)(iii) (1994)), *with* 38 C.F.R. § 3.307(a)(6)(iii) (1994) (defining "service in the Republic of Vietnam"). Thus, it appears that the M21-1 provision contains additional criteria not present in the regulation, 38 C.F.R. § 3.307(a)(6)(iii), that mandate the application of the presumption of service connection. Therefore, contrary to the Secretary's arguments, it appears that it was the longstanding policy of VA to award service connection on a presumptive basis in cases in which the veteran served in waters offshore and received the VSM, without regard to the veteran's physical presence on land in Vietnam.

3. Plainly Erroneous Regulatory Interpretation

The Court also concludes that VA's current interpretation of its regulatory definition is based on a misguided and plainly erroneous review of the legislative history of 38 U.S.C. § 101(29), which sets forth the period for Vietnam-era service, and which VA avers supports its conclusion that Congress intended to limit the period to cover only "those veterans who actually served within the borders of the Republic of Vietnam," and, thus, "service in the Republic of Vietnam" must also be limited to those veterans who served on the land mass of Vietnam. *See* G.C. Prec. 27-97; *see also Bowles*, *supra* (noting that an agency interpretation of a regulatory provision controls unless it is "plainly erroneous or inconsistent"); *Smith (Ellis)*, *supra*. This history is set forth in VA General Counsel precedent opinion 27-97. Although the Board is bound by such

opinions, the Court is not. *See* 38 U.S.C. § 7261; *see also Theiss v. Principi*, 18 Vet.App. 204, 210 (2004).

The statutory provision discussed in VA General Counsel precedent opinion 27-97, 38 U.S.C. §101(29), was amended in 1996 with the passage of the Veterans' Benefits Improvements Act, Pub. L. No. 104-275, § 505, 110 Stat. 3322, 3341 (1996). In introducing this amendment to the Senate, Senator Simpson stated that the statutory definition of Vietnam-era service extant at the time only covered service from August 5, 1964 (the date of the Gulf of Tonkin resolution), forward, thus excluding those troops who were in Vietnam as early as February 28, 1961, participating in combat missions. 142 CONG. REC. S11,774, 11,779 (daily ed. Sept. 28, 1996). He noted that it was "entirely appropriate that [VA] benefits be extended to those who actually faced peril in Vietnam before that war's 'legal' starting date." *Id.* Similarly, the Senate reported that, for the purpose of section 1116(f), the appropriate period of service would start from January 9, 1962, the date on which the use of herbicides and defoliants in Vietnam began. *See* S. REP. NO. 104-371 (1996), as *reprinted in* 1996 U.S.C.C.A.N. 3,762, 3,772. Thus, Congress determined that "benefits that are premised on presumed exposure to defoliants and herbicides shall be available to all who served in the Republic of Vietnam when such materials were present there, but that they not be extended to those who served in the Republic of Vietnam only before such materials were introduced." *Id.* Thus, contrary to the Secretary's assertion, this amendment was not based on Congress's intent to focus solely on ground forces, but rather it was meant to encompass all veterans who may have been at risk for exposure based on the time frame during which those herbicides and defoliants were sprayed in the Republic of Vietnam.

Furthermore, even if it is a correct interpretation of section 1116(f), this VA General Counsel precedent opinion, limited to a specific type of service – service on a deep water vessel offshore of Vietnam – is inapplicable to the appellant's claim. This opinion cannot be read to further exclude another type of service that was not contemplated by VA in General Counsel precedent opinion 27-97, service such as that described by the appellant in his uncontradicted testimony, that his ship sailed in close proximity to the shore, yet he never set foot on land. Using VA's risk-of-exposure test outlined in its June 2001 notice of final rulemaking, given the spraying of Agent Orange along the coastline and the wind borne effects of such spraying, it appears that these veterans serving on vessels in close proximity to land would have the same risk of exposure to the herbicide Agent Orange as veterans serving on adjacent land, or an even greater risk than that borne by those veterans who may have visited and set foot on the land of the Republic of Vietnam only briefly. *See* 66 Fed. Reg. 23,166. This type of service may reasonably be equated to that of the veteran serving on a vessel operating in the inland waterways of the Republic of Vietnam without having set foot on land, contrary to the Secretary's assertions made during oral argument.[5]

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[5] During oral argument, in an attempt to clarify the limits of the Secretary's bright-line interpretation, the Court asked a series of questions. The Secretary's responses only served to confirm the Court's conviction that VA's interpretation is unreasonable, and when applied, results in such disparate outcomes that it cannot be said to comport with Congress's intent in enacting 38 U.S.C. § 1116(f). When asked to apply the regulatory interpretation in the case of a veteran who was in the waters off of Vietnam, in such sufficient depth of water that his feet did not touch the seabed, versus a veteran who was in the waters off of Vietnam and was able to touch the seabed, the Secretary responded that neither veteran would be entitled to the presumption because the

The Secretary has provided no rational distinction between these types of service and the Court can divine none. *See Smith (Ellis)*, 451 F.3d at 1351 (noting conditions under which VA's interpretation as set forth in litigation documents and proceedings is entitled to deference); *see also Auer*, 519 U.S. at 461-62. Thus, in light of the lack of clear legislative history on this subject and VA's own plainly erroneous and under-inclusive interpretation, the Court concludes that § 3.307(a)(6)(iii) must be read to include at least service of the nature described by the appellant, that is, service in the waters near the shore of Vietnam, without regard to actual visitation or duty on land in the Republic of Vietnam. Furthermore, this interpretation is supported by VA's M21-1 provisions, as outlined earlier, regarding the application of the presumption in claims for service connection based on exposure to herbicides.

4. Unreasonable Interpretation of Regulation

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regulatory definition is limited to those veterans "who set foot on land, if you will boots on ground, not touching the ocean floor." Furthermore, when asked whether there was a rational distinction between the case of a veteran aboard a vessel floating up an inland body of water such as a river (which, according to the Secretary's argument, could be miles wide), who never touched land within the geographic area of Vietnam, and a veteran who served on a ship within 100 feet of the shoreline who never touched the land, the Secretary simply responded without rationale that the latter form of service would not warrant application of the presumption. Finally, when asked whether the issue was if the veteran had been subject to being sprayed with Agent Orange, the Secretary simply reiterated that the veteran in this case, who testified that he had served within close proximity to the shore, did not have service in the Republic of Vietnam according to the regulatory definition. Thus, when further given the opportunity to provide a reasoned basis for this bright-line rule, the Secretary could not.

Finally, the Court notes that VA also has not provided valid or thorough reasoning for either its present interpretation of what constitutes "service in the Republic of Vietnam," or the difference in construction of the definition among the various regulations incorporating the definition. *See Skidmore*, *supra*. In September 1993, pursuant to the congressional mandate of the 1991 act, VA proposed deleting § 3.311a and replacing it with § 3.307(a)(6)(iii). In its notice of proposed rulemaking, VA reported that its regulations addressed the issue of diseases resulting from herbicide exposure under two separate sets of criteria, at 38 C.F.R. §§ 3.307 and 3.309 (implementing the statutory presumption established by Congress under Public Law 102-4), and at 38 C.F.R. § 3.311a, which established service connection on the basis of exposure to herbicides containing dioxin pursuant to Public Law 98-542. VA noted that since "[s]ection 10 of Public Law 102-4 amended Public Law 98-542 by removing the provisions concerning dioxin exposure . . . there is . . . no need for VA to maintain separate regulations on this issue." 58 Fed. Reg. 50,528, 50,529 (Sept. 28, 1993). VA therefore proposed "to amend 38 C.F.R. § 3.307(a)(6) so that it . . .[b]ases the presumption of service connection on exposure to certain herbicide agents rather than on service in the Republic of Vietnam during the Vietnam era as it currently does, . . . [and] incorporates the definition of the term 'service in the Republic of Vietnam' from 38 C.F.R. § 3.311a." *Id.* No comments were reported received, and the regulation was adopted without change. *See* 59 Fed. Reg. 5106 (Feb. 3, 1994) (noting that 38 C.F.R. § 3.307(a)(6)(iii) defines "service in the Republic of Vietnam" as including "service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam").

The notice of proposed rulemaking, as well as the notice of the final rule, does not contain any explanation indicating that VA viewed this regulation as limiting application of the presumption to those who actually set foot on land in the Republic of Vietnam. The Court notes that 38 C.F.R. § 3.313, promulgated in 1990 and also defining "service in the Republic of Vietnam," was neither amended nor removed by this change and remains in effect today. *See id.; see also* 38 C.F.R. § 3.313 (2005). The variance in form of these regulatory provisions defining "service in the Republic of Vietnam," as discussed earlier, leaves the Court to ponder, what, exactly, VA intended in seeking to fill the gap left by section 1116(f). *See supra* at 9. The critical ambiguity in VA's interpretation of its defining regulation similarly leaves veterans and VA adjudicators to puzzle over how the regulation should be applied.

Furthermore, on July 9, 2001, when VA added diabetes mellitus, the disease for which the appellant seeks service connection, to the list of presumptive conditions, it noted, in addition to VA's previous interpretation (although not set forth explicitly during prior rulemakings, as evident above), that the term "service in the Republic of Vietnam" is construed as including service in the inland waterways, but not service in waters offshore unless such service involved duty in or visitation to the Republic of Vietnam. *See* 66 Fed. Reg. 23,166 (July 9, 2001). In response to a comment that specifically requested that VA include service in the waters offshore of Vietnam, VA relied on the argument that, since the regulation predated the enactment of 38 U.S.C. § 1116(f), Congress could not have intended to broaden the definition. The Court has already found this argument unpersuasive. In addition, without citing any authority or evidence

supporting its apparent contention that exposure was more prevalent among Vietnam-era veterans who had spent some time on land, no matter how fleeting, VA declined to make a change to its proposed regulation on the basis that "the commenter cited no authority for concluding that individuals who were serving in the waters offshore of the Republic of Vietnam were subject to the same risk of exposure as those who served within the geographic boundaries of the Republic of Vietnam." *Id.* It is not a commenter's responsibility to provide a rationale for VA policy; rather, it is the agency's obligation to account for the relevant data and provide an explanation for its decision. *See Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962).

Absent any discussion regarding the scientific studies mandated by Congress on this subject or any other evidence that contributed to VA's decision to limit the definition, the Court can only conclude that VA's asserted interpretation of this regulation is not the product of agency expertise. Applying this interpretation, VA would afford the presumption of exposure to Agent Orange to a Vietnam-era veteran who served only in the inland waterways of the Republic of Vietnam and never set foot on land; yet, in order for a Vietnam-era veteran serving in the waters surrounding Vietnam to be entitled to the presumption, he or she must have set foot on land, without consideration as to either the length of time spent patrolling in the waters offshore, or the risks of windblown exposure to Agent Orange sprayed along Vietnam's coastline. Likewise, a staff officer whose only contact with the Republic of Vietnam was a one-hour stop at the airport at Saigon would be entitled to the presumption of exposure to herbicides, but a service member who spent months patrolling the nearshore coastline of the Republic of Vietnam without setting foot on its soil, would not.

Furthermore, these distinctions do not comport with the legislators' view of the purpose of the 1984 act (which set forth VA's authority to promulgate such regulations), as expressed by Senator Simpson, that veterans "have their exposure claims adjudicated under uniform and consistent regulations that incorporate rational scientific judgments." 130 CONG. REC. S13,591 (daily ed. Oct. 4, 1984). Given Congress's express concern that exposure to Agent Orange could not be determined by tracking troop movements, and VA's acknowledgment that it could not pinpoint exactly who may have been exposed to dioxin despite the fact that many of the 2.4 million troops were deployed in or near locations where Agent Orange was sprayed, it is clear to the Court that VA's interpretation of its regulatory definition fails to consider an important aspect of the problem contemplated by both Congress and VA: the inability to determine exactly who was exposed to Agent Orange. Therefore, the Court cannot conclude that VA was either thorough in its consideration of this most recent interpretation of this definition, or that its reasoning is valid. *See Martin* and *Skidmore*, both *supra*.

D. Effect of M21-1 Provisions

1. M21-1 provisions are substantive in nature.

The Secretary maintains that the M21-1 provisions allowing for application of the presumption of service connection based on receipt of the VSM are interpretive in nature and merely exist to provide guidance in adjudicating claims; thus, the regulatory definition should control the outcome in this instance. *See* Sec'y Suppl. Br. at 16. Even if the regulation were clear, which we have already determined it is not, the Court cannot agree. The Court has held, in cases similar to the instant matter, that where the M21-1 provision

does not merely clarify or explain an existing rule or statute but "prescribes what action must be taken in the initial levels of adjudication," the rule is substantive rather than procedural and has the force and effect of law. *Fugere v. Derwinski*, 1 Vet.App. 103, 107 (1990); *see Hamilton v. Derwinski*, 2 Vet.App. 671, 675 (1991) (holding that "[s]ubstantive rules, those which have the force of law and narrowly limit administrative action, in the VA Adjudication Procedure Manual are the equivalent of Department Regulations"). Such is the case in the instant appeal.

The Secretary argues that should the Court be persuaded that the M21-1 provisions are substantive, then this case is similar to that discussed in *Dyment v. Principi*, 287 F.3d 1377, 1381 (Fed. Cir. 2002), in which the Federal Circuit determined that M21-1, part VI §7.68(b)(2), did not create a presumption of exposure to asbestos and was simply an interpretive rule not subject to the notice and comment process dictated by 5 U.S.C. § 553(a). *Dyment*, 287 F.3d at 1381 (holding not substantive in nature an M21-1 provision, which merely alerted adjudicators to the fact that veterans who served in U.S. Naval shipyards during WWII might have a greater incidence of exposure to asbestos, and, thus, a more extensive review of their service records should be conducted). Similarly, the Secretary maintains that M21-1, part III, paragraph 4.24(g), provides only advisory guidelines for the adjudication of herbicide exposure claims.

The M21-1 provision in this instance, however, does more than merely caution adjudicators as to the possible exposure to herbicides for Vietnam-era veterans; it instructs adjudicators to apply the presumption in cases in which the veteran received the VSM. It creates additional criteria not present in the statute or

regulation that would warrant application of the presumption, which, when applied, dictate the award of service connection and, thus, establish entitlement to a monthly monetary benefit. *See Walters v. Nat'l Assoc. of Radiation Survivors*, 473 U.S. 305, 312 (1985) (acknowledging that VA benefits are similar to the Social Security benefits the Supreme Court addressed in *Matthews v. Eldridge*, 424 U.S. 319, 332-33 (1976), and determined that the continued receipt of such benefits is a property interest protected by the fifth amendment). Thus, the Court cannot conclude that this provision is merely interpretive in nature. Rather, it is substantive and has the force and effect of law, indistinguishable from an agency regulation promulgated through the appropriate public notice and comment process.

The Court is not persuaded by the Secretary's argument that the earlier M21-1 provision conceding qualifying service if the veteran was awarded the VSM "in the absence of contradictory evidence" was intended to indicate that "evidence to the contrary" included evidence that the recipient never set foot on Vietnamese soil. Were this the case, there would be no need for the provision of subparagraph (2), which requires analysis of a ship's operating environment for those who served offshore and did not receive the VSM. Rather, it appears to the Court that it is far more reasonable to interpret this provision as conceding service for the purpose of application of the presumption unless there was evidence that the recipient of the VSM had received it for service in a neighboring country or location that reasonably precluded exposure to Agent Orange.

2. Failure to Comply with 5 U.S.C. § 553

The Secretary argues that should the Court be persuaded that the M21-1 provisions in effect at the time the appellant filed his claim are substantive in nature, those provisions must be considered void since they were not promulgated pursuant to the requirements of 5 U.S.C. § 553(a). *See* Sec'y Suppl. Br. at 20. It is surprising that the Secretary should make such an argument, attempting to benefit from an assertion of his own noncompliance with the law. *See Fugere*, 1 Vet.App. at 109-10 (striking down the same argument as applied to an attempted rescission of an M21-1 provision). Additionally, the Secretary argues that the pre-February 2002 M21-1 provisions should not be enforced in this instance because they do not comply with the statutory authority since they do not address physical presence on land. This argument must also fail because, as noted above, the term "service in the Republic of Vietnam" is sufficiently vague that it does not mandate actual physical presence on land in either the statute or the Secretary's regulations. In cases such as this, where VA has failed to comply with the APA, 5 U.S.C. § 553(a), and afford veterans notice and opportunity to comment regarding the promulgation and rescission of substantive rules, VA regulations require that "no person shall be required to resort to, or be adversely affected by any matter required to be published . . . in the Federal Register and not so published." 38 C.F.R. § 1.551(c). Accordingly, the February 2002 attempted rescission was "without observance of procedure required by law" and is set aside pursuant to 38 U.S.C. § 7261(a)(3)(D). Consequently, the M21-1 provision in effect prior to the February 2002 rescission is binding on the Agency. *See Hamilton*, 2 Vet.App. at 675; *Fugere*, 1 Vet.App. at 107.

3. Applying the Appropriate M21-1 Provisions

At the time the appellant filed his claim in August 2001, the M21-1 provision in effect since 1991 allowed for application of the presumption based on receipt of the VSM, except under the General Counsel's interpretation that it did not apply in cases where the veteran participated in high altitude flights only. In February 2002, VA replaced that provision with a provision that clearly spelled out VA's limited current interpretation of its own regulation, as follows:

> (1) It may be necessary to determine if a veteran had "service in Vietnam" in connection with claims based on exposure to herbicide agents. *A veteran must have actually served on land within the Republic of Vietnam* . . . to qualify for the presumption of exposure to herbicides. . . . The fact that a veteran has been awarded the Vietnam Service Medal does not prove that he or she was "in country." Service members who were stationed on ships offshore, or who flew missions over Vietnam, but never set foot in-country were sometimes awarded the Vietnam Service Medal. . . . .
>
> (2) If a veteran claims service connection for exposure to herbicide agents, and alleges service on a ship in the waters offshore of Vietnam, review the record for evidence that the ship was in the waters off Vietnam *and that the veteran's service involved duty or visitation on land.* If the veteran cannot produce evidence of this, request verification from the Navy.

M21-1, pt. III, para. 4.24(e)(1)-(2), change 88 (Feb. 27, 2002) (emphasis added).

Because these M21-1 provisions have the force and effect of Department regulations, the Court will apply its caselaw regarding changes in the law during the

course of a claim's processing and adjudication. The Court has previously held that "where the law or regulation changes after a claim has been filed or reopened but before the administrative or judicial appeal process has been concluded, the version most favorable to the appellant . . . will apply unless Congress provided otherwise or permitted the Secretary to do otherwise and the Secretary did so." *Karnas v. Derwinski*, 1 Vet.App. 308, 313 (1991), *overruled on other grounds by Kuzma v. Principi*, 341 F.3d 1327, 1328 (Fed. Cir. 2003). The Federal Circuit clarified this rule in *Kuzma*, *supra*, by holding that a statute may have such a retroactive effect if Congress clearly intends that result. *Kuzma*, 341 F.3d at 1328 (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 272-73 (1994), and holding that section 3(a) of the Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096, could not be applied retroactively because Congress made no mention of such an intention). The application of an amended regulation will be deemed to have a retroactive effect "when a substantive right [is] taken away or narrowed," or "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280; *see Stolasz v. Nicholson*, 19 Vet.App. 355, 360 (2005); *Rodriguez v. Nicholson*, 19 Vet.App. 275, 287 (2005) (determining that the application of amended 38 C.F.R. § 3.22 would take a substantive right from the appellant).

In this instance, there is no congressional mandate authorizing a retroactive application of the February 2002 version of M21-1, part III, paragraph 4.24(c). Furthermore, application of the February 2002 M21-1 provision deprived the appellant of a substantive right to the application of the presumption of exposure to

herbicides based upon his receipt of the VSM, which would have been applied under the M21-1 version in effect at the time the appellant filed his claim. Accordingly, even if the February 2002 provision was deemed to be in accordance with law, its application in this instance would have an impermissible retroactive effect, which would require that the Court remand for application of the appropriate M21-1 provision.

E. Consideration of Direct and Secondary Service Connection

The Secretary has conceded that a remand is warranted because the Board failed to evaluate the appellant's claim under direct service connection principles. Given the evidence of diabetes mellitus symptomatology during service and within one year after service, as outlined *supra*, the Court agrees. However, because of the Court's reversal as to the Board's determination that the appellant was not entitled to the presumption of exposure to herbicides, such consideration is not necessary upon remand. Although the appellant requests that we remand this matter with instructions to award service connection, we are not in a position to do so.

The appellant is correct that the Board, in its decision, did not challenge his diagnosis of diabetes mellitus. However, 38 C.F.R. § 3.307(a)(6)(ii) does not allow for presumptive service connection for any of the listed diseases unless the disease has "become manifest to a degree of 10 percent or more at any time after service." In this case, there has not yet been a determination that the appellant's diabetes mellitus is disabling to a compensable degree. *See* 38 C.F.R. § 4.120, Diagnostic Code 7913 (2005) (detailing the requirements for a compensable disability rating for diabetes). Accordingly, an award of service connection

at this time would be premature and remand is the appropriate remedy. *See Elkins v. Gober,* 229 F.3d 1369, 1377 (Fed. Cir. 2000); *see also Majeed v. Nicholson*, 19 Vet.App. 525, 530 (2006) (noting that the Secretary must make the initial determination of whether a disability rises to a level that makes it compensable).

Upon remand, the appellant is free to argue this issue, and present any additional evidence and arguments to the Board, and the Board is required to consider them. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002); *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999) (per curiam order). Additionally, should the Board award service connection for diabetes mellitus, the Court expects that the proper procedure will be afforded to the appellant's claims for secondary service connection for peripheral neuropathy, nephropathy, and retinopathy, all claimed as residuals of diabetes mellitus. *See* R. at 5 (noting that the Board found that "VA clincial records beginning in 2000 reveal diagnoses of type-II diabetes, peripheral neuropathy, nephropathy, and retinopathy, thereby satisfying the initial element of a service-connection claim"). The Secretary is expected to provide expeditious treatment of these matters pursuant to 38 U.S.C. §§ 5109B, 7112.

IV. CONCLUSION

After consideration of the appellant's and the Secretary's briefs, oral argument as presented on January 10, 2006, and a review of the record on appeal, the Court finds that VA's regulation defining "service in the Republic of Vietnam," 38 C.F.R. § 3.307(a)(6)(iii), is permissible pursuant to *Chevron*; however, the regulation is ambiguous. VA's argued interpretation of the regulatory term "service in the Republic of Vietnam," affording the application of the presumption

of exposure to herbicides only to Vietnam-era veterans who set foot on land and not to the appellant, is inconsistent with longstanding agency views, plainly erroneous in light of legislative and regulatory history, and unreasonable, and must be SET ASIDE. In this case, the M21-1 provision allowing for the application of the presumption of exposure to herbicides based on the receipt of the VSM controls.

The February 2004 Board decision, therefore, is REVERSED to the extent that the Board denied the appellant the presumption of exposure to herbicides and the matter is REMANDED with instructions to apply the presumption in a manner consistent with the interpretation set forth in this opinion. If service connection for diabetes mellitus is awarded upon remand, VA should ensure appropriate processing of the appellant's claims for secondary service connection for peripheral neuropathy, nephropathy, and retinopathy, claimed as residuals of diabetes mellitus. Furthermore, M21-1, part III, paragraph 4.24(e), change 88 (Feb. 27, 2002), is SET ASIDE pursuant to 38 U.S.C. § 7261(a)(3)(D).

APPENDIX D

[Logo] BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

[Filed FEB 20, 2004]

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DOCKET NO. 03-05 049

IN THE APPEAL OF JONATHAN L. HAAS

On appeal from the Department of Veterans Affairs
Regional Office in Phoenix, Arizona

THE ISSUE

Entitlement to service connection for type-11 diabetes mellitus with peripheral neuropathy, nephropathy, and retinopathy, claimed as loss of eyesight, all secondary to exposure to herbicide agents.

WITNESS AT HEARING ON APPEAL

Appellant

ATTORNEY FOR THE BOARD

Jeffrey J. Schueler, Counsel

INTRODUCTION

The appellant had active service from September 1959 to September 1960, and from May 1963 to June 1970. He also had other periods of service during a career in the Naval Reserve ending in 1997.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from a May 2002 rating

decision of the Department of Veterans Affairs (VA) Regional Office (RO) in Phoenix, Arizona. In that determination, the RO denied the claim listed on the title page. The appellant disagreed and this appeal ensued.

In July 2003, the appellant testified at a hearing held before the undersigned, the Veterans Law Judge designated by the Chairman to conduct the hearing and render a decision in this case pursuant to 38 U.S.C.A. § 7107(c) (West 2002). A transcript of the hearing is of record.

FINDINGS OF FACT

1. The appellant served aboard the *USS Mount Katmai* in the waters off the coast of the Republic of Vietnam, but did not visit or perform duties in the Republic of Vietnam.

2. The appellant's diagnosed type-II diabetes mellitis with peripheral neuropathy, nephropathy, and retinopathy, claimed as loss of eyesight, is not shown by competent medical evidence to be the result of exposure to herbicides during service, or to any other disease, injury or incident in service.

CONCLUSIONS OF LAW

1. The appellant did not have "service in the Republic of Vietnam" as defined for purposes of VA compensation benefits.

2. Type-II diabetes mellitus with peripheral neuropathy, nephropathy, and retinopathy, claimed as loss of eyesight was not incurred in or aggravated during active service. 38 U.S.C.A. §§ 1110, 1116, 5102, 5103, 5103A, 5107 (West 2002); 38 C.F.R. §§ 3.303, 3.307, 3.309; 3.313 (2003).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

I. Analysis

The appellant asserts that he has type-II diabetes mellitus (as well as other residual disorders including peripheral neuropathy, nephropathy, and retinopathy, claimed as loss of eyesight) related to exposure to herbicide agents during his service aboard a naval ship in the waters off Vietnam in the late 1960s. The law provides that a claimant, who, during active service, served in the Republic of Vietnam during the Vietnam era, shall be presumed to have been exposed during such service to an herbicide agent, unless there is affirmative evidence to establish that he was not exposed to any such agent during that service. 38 U.S.C.A. § 1116(f) (West 2002).

The "Vietnam era" for these purposes is the period beginning on January 9, 1962, and ending on May 7, 1975, in the case of a veteran who served in the Republic of Vietnam during that period. 38 U.S.C.A. § 1116(a)(1) (West 2002). An "herbicide agent" is a chemical in an herbicide used in support of the United States and allied Military operations in the Republic of Vietnam during this period. 38 U.S.C.A. § 1116(a)(3) (West 2002); 38. C.F.R. § 3.307(a)(6)(i) (2003).

The diseases for which service connection may be presumed based on exposure to an herbicide in Vietnam during the Vietnam era are listed at 38 C.F.R. § 3.309(e) (2003). They are chloracne or other acneform disease consistent with chloracne; Type 2 diabetes; Hodgkin's disease; multiple myeloma; non-Hodgkin's lymphoma; acute and subacute peripheral

neuropathy; porphyria cutanea tarda; prostate cancer; respiratory cancers (cancer of the lung, bronchus, larynx, or trac hea); and soft-tissue sarcoma (other than osteosarcoma, chondrosarcoma, Kaposi's sarcoma, or mesothelioma). The term "acute and subacute peripheral neuropathy" means transient peripheral neuropathy that appears within weeks or months of exposure to an herbicide agent and resolves within two years of the date of onset. *See also* 38 U.S.C.A. § 1116(a)(2) (West 2002); 38 C.F.R. § 3.307(a) (2003).

VA has determined that there is no positive association between exposure to herbicides and any other condition for which it has not specifically determined a presumption of service connection is warranted. 61 Fed. Reg. 41,446 (1996); 59 Fed. Reg. 341-46(1994). The appellant is not precluded, though, froth establishing service connection with proof of actual direct causation. Even if an appellant is found not entitled to a regulatory presumption of service connection, the claim must still be reviewed to determine if service connection can be established on a direct basis. *See Combee v. Brown*, 34 F.3d 1039 (Fed. Cir. 1994) (holding that the Veterans' Dioxin and Radiation Exposure Compensation Standards (Radiation Compensation) Act, Pub. L. No. 98-542, § 5, 98 Stat. 2724, 2727-29 (1984), does not preclude a veteran from establishing service connection with proof of actual direct causation).

Service connection Means that the facts; shown by evidence, establish that a particular injury or disease resulting in disability was incurred in the line of duty in the active military service or, if pre-existing such service, was aggravated during service. 38 U.S.C.A. §§ 1110, 1131 (West 2002); 38 C.F.R. § 3.303(a)

(2003). In order to establish service connection, either the evidence must show affirmatively that such a disease or injury was incurred in or aggravated by service, or statutory presumptions may be applied. There-must be medical evidence of a current disability, medical or lay evidence of in-service incurrence or aggravation of a disease or injury, and medical evidence linking the current disability to that in-service disease or injury. *Pond v. West*, 12 Vet. App. 341, 346 (1999); *Hickson v. West*, 12 Vet. App. 247, 253 (1999).

A veteran who has 90 days or more of wartime service may be entitled to presumptive service connection of a chronic disease, such as diabetes, that becomes manifest to a degree of 10 percent or more within one year from service. This presumption is rebuttable by affirmative evidence to the contrary. 38 U.S.C.A. §§ 1112, 1113, 1137 (West 2002); 38 C.F.R. § 3.307 (2003).

The appellant's service medical records are silent as to diabetes. In October 1967, the appellant was treated at the Naval Hospital in Subic Bay, the Philippines, for kidney disease, gouty arthritis with hyperuricemia, and obesity. Clinical records in June 1968 and November 1969 indicated gout involving the right and left great toes. VA clinical records beginning in 2000 reveal diagnoses of type-II diabetes, peripheral neuropathy, nephropathy, and retinopathy, thereby satisfying the initial element of a service-connection claim.

The question in this case—as argued by the appellant and as discussed by the RO in its determinations—is whether the appellant's service aboard a naval vessel off the coast of Vietnam satisfied the requirement that he have "service in the Republic of

Vietnam." The appellant contends in various statements and in his testimony at a hearing in July 2003 that he served aboard *USS Mount Katmai* (AE-16), an ammunition supply ship operating in the Western Pacific. During this service, he alleges the *Mount Katmai* resupplied smaller boats and ships with ammunition, food, fuel, and other stores. As the ship was designed to carry highly explosive ammunition, he noted that it never entered port in Vietnam. He recalled that while operating in coastal waters, just 100 feet off the coast, aircraft sprayed defoliant over coastal jungle areas and that clouds of the defoliant blew out to sea enveloping his ship and contaminating him. The appellant further contends his receipt of hazardous duty pay for being in Vietnamese waters and the award of the Vietnam Service and Campaign Medals support his allegations, though he acknowledges the *Mount Katmai* never moored in a Vietnamese port and he never set foot ashore.

The record includes service department records showing he served aboard the *Mount Katmai* from August 1967 April 1969. Copies of his fitness reports for this period show his general capabilities and his deployment to the Western Pacific and Vietnam. The service department has confirmed the appellant had Vietnam service on various dates from September 1967 to March 1969, which it presumably used in determining the appellant's eligibility for service awards and hazardous duty pay.

A definition of "Service in the Republic of Vietnam" is provided by regulation and includes service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam. 38 C.F.R. §§ 3.307(a)(6)(iii), 3.313 (2003). This definition is of limited application,

for it governs eligibility for compensation based on exposure to herbicide agents ashore; it is axiomatic that such agents, which destroyed vegetation, were not used at sea.

The VA General Counsel has determined that the regulatory definition (which permits certain personnel not actually stationed within the borders of the Republic of Vietnam to be considered to have served in that Republic) requires that an individual actually have been present within the boundaries of the Republic. *See* VAOPGCPREC 27-97. Specifically, the General Counsel has concluded that in order to establish qualifying "service in Vietnam" a veteran must demonstrate actual duty or visitation in the Republic of Vietnam. Service on a deep water naval vessel' in waters off the shore of the Republic of Vietnam, without proof of actual duty or visitation in the Republic of Vietnam, does not constitute service in the Republic of Vietnam for purposes of 38 U.S.C.A. § 101(29)(A) (establishing that the term "Vietnam era" means the period beginning on February 28, 1961 and ending on May 7, 1975 in the case of a veteran who served in the Republic of Vietnam during that period). *See* VAOPGCPREC 27-97. Similarly, in another precedent opinion, the VA General Counsel concluded that the term "service in Vietnam" does not include service of a Vietnam era veteran whose only contact with Vietnam was flying high-altitude missions in Vietnamese airspace. *See* VAOPGCPREC 7-93. Again, a showing of actual duty or visitation in the Republic of Vietnam is required to establish qualifying service in Vietnam.

The service department records, by referencing the appellant's receipt of the Vietnam Campaign and Service Medals, indicate that his service qualified

him for awards and benefits (e.g., medals and hazardous duty pay) pursuant to the service departments regulations pertaining to these matters. Those regulations are applicable only as to matters within the jurisdiction of the service department (in this case the Navy), and are not applicable to matters within the jurisdiction of VA, such as veterans' compensation benefits. Such matters are governed by the statutes and regulations cited above. Though the service department records do not indicate the exact location of the *Mount Katmai* within Vietnamese waters, or the appellant's specific duties while in the waters off the coast of Vietnam, they show his presence in these waters. The evidence establishes that the appellant has Vietnam Service, however, this case turns on whether he can demonstrate actual duty or visitation in the Republic of Vietnam. As noted above, service on a deep-water naval vessel in waters off the shore of the Republic of Vietnam, without proof of actual duty or visitation in the Republic of Vietnam, does not constitute service in the Republic of Vietnam for purposes of 38 U.S.C.A. § 101(29)(A). Here, the appellant acknowledges he did not go ashore in Vietnam and that his ship never moored in Vietnam.

This latter point is significant. The regulations cited above preclude application of the presumptions in 38 C.F.R. §§ 3.307, 3.309 (2003), where the claimant served only in the waters offshore and where the claimant did not work in or visit the Republic of Vietnam. As the appellant testified he did not perform duties ashore or visit Vietnam, it cannot be said that he had "service-in the Republic of-Vietnam" for purposes of 38 U.S.C.A. § 101(29)(A). He disagrees with this application of the law, but the

Board is bound by this definition -and is not vested with power to change it.

As for his allegations that the *USS Mount Katmai* was enveloped by clouds of herbicide agents while operating within 100 feet of the coast of Vietnam, that allegation is unsupported by any evidence demonstrating that this ship was located in waters sprayed by herbicides.

Based upon the above analysis, service connection for type-II diabetes mellitus, peripheral neuropathy, nephropathy, and retinopathy, claimed as loss of eyesight, based on alleged herbicide exposure, is not presumed.

As the appellant is not precluded from establishing service connection with proof of actual direct causation, *see Combee,* 34 F.3d at 1041-42, service connection may alternatively be established through medical evidence of a current disability, medical or lay evidence of in-service incurrence or aggravation of a disease or injury, and medical evidence linking the current disability to that in-service disease or injury. *Pond*, 12 Vet, App. at 346; *Hickson*, 12 Vet. App. at 253. The first indication of the appellant's diabetes is in 2000, about 30 years after he separated from service, and more than three years after any performance of active duty for training or other periods of active duty associated with his affiliation with the Naval Reserve. This is beyond the one-year presumption period set forth in 38 C.F.R. §§ 3.307, 3.309 (2003). The appellant argues that he was treated for gout in 1967, which he contends is a precursor of diabetes. He has provided no medical evidence to support his contention that this is connected to herbicide exposure in Vietnam or is connected to his current diabetes diagnosis.

In summary, the record does not include any current medical evidence showing that the appellant has a disease that might be related to exposure to herbicide agents or is the result of a disease or injury the appellant had in service. In light of the evidence and based on this analysis, it is the determination of the Board that the preponderance of the evidence is against the claim of service connection for type-II diabetes mellitus with-peripheral neuropathy, nephropathy, and retinopathy, claimed as loss of eyesight, all secondary to exposure to herbicide agents or otherwise related to service.

II. Duty to Notify and Assist

The United States Court of Appeals for Veteran Claims' (Court's) decision in *Pelegrini v. Principi*, No. 01-944 (U.S. Vet. App. Jan. 13, 2004) held, in part, that a VCAA notice, as required by 38 U.S.C. § 5103(a), must be provided to a claimant before the initial unfavorable agency of original jurisdiction (AOJ) decision on a claim for VA benefits.

In adjudicating this claim, the Board reviewed the evidence of record and the ROs development of that evidence to ensure compliance with the applicable notice and assistance obligations. The Veterans Claims Assistance Act of 2000 (VCAA.) redefined VAs duty to assist, enhanced its duty to notify a claimant as to the information and evidence necessary to substantiate a claim, and eliminated the well-grounded-claim requirement. *See* 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5107, 5126 (West 2002); 38 C.F.R. §§ 3.102, 3.156, 3.159, and 3.326 (2002).

The VCAA prescribed that the amendments to 38 U.S.C.A. § 5107 are effective retroactively to claims filed and pending before the date of enactment. 38

U.S.C.A. § 5107 note (Effective and Applicability Provisions) (West 2002). The United States Court of Appeals for the Federal Circuit has ruled that the retroactive effective date provision of the Act applies only to the amendments to 38 U.S.C.A. § 5107. *See Bernklau v. Principi*, 291 F.3d 795 (Fed. Cir. 2002); *Dyment v. Principi*. 287 F.3d 1377 (Fed. Cir. 2002). However, the VA regulations promulgated to implement the Act provide for the retroactive effect of the regulations, except as specified. *See* 66 Fed. Reg. 45,620 (Aug. 29, 2001). Whereas VA regulations are binding on the Board, 38 C.F.R. § 20.101(a) (2002), the Board in this decision will apply the regulations implementing the VCAA as they pertain to the claims at issue.

VA must provide the claimant and the claimant's representative, if any, notice of required information and evidence not previously provided that is necessary to substantiate the claims. 38 U.S.C.A. § 5103(a) (West 2002); 38 C.F.R. § 3.159(b) (2003). The appellant has been provided with adequate notice of the information and evidence necessary to substantiate the claim. The RO has sent him letters in August 2001, December 2001, January 2002, July 2002, and June 2003, discussing the need for information concerning his alleged exposure to herbicide agents while ashore in Vietnam. In a December 2002 statement of the case, the RO told the appellant of the criteria for proving service connection based on exposure to herbicide agents and the evidence considered in evaluating the claim. This document listed the evidence considered, the legal criteria for evaluating the claim, and the analysis of the facts as applied to those criteria, thereby informing the appellant of the information and evidence necessary to substantiate the claim.

There is no indication that additional notification of the types of evidence needed to substantiate the claims, or of VA's or the appellant's responsibilities with respect to the evidence, is required. *See Quartuccio v. Principi*, 16 Vet. App. 183 (2002).

VA must also make reasonable efforts to assist the claimant in obtaining evidence necessary to substantiate the claim for the benefit sought, unless no reasonable possibility exists that such assistance would aid in substantiating the claim. 38 U.S.C.A. § 5103A(a) (West 2002); 38 C.F.R. § 3.159(c), (d) (2003). Such assistance includes making every reasonable effort to obtain relevant records (including private and service medical records and those possessed by VA and other Federal agencies) that the claimant adequately identifies to the Secretary and authorizes the Secretary to obtain. 38 U.S.C.A. § 5103A(b) and (c) (West 2002); 38 C.F.R. § 3.159(c) (1-3) (2003). The record included VA clinical and treatment records, as well as the service medical and personnel records governing the appellant's service. Given the disposition of this case, and the appellant's allegations, these records address the evidentiary needs of this case. The appellant has not identified any other relevant sources of treatment. The Board concludes that VA has undertaken reasonable efforts to assist the appellant in obtaining evidence necessary to substantiate the claim for the benefit sought.

Assistance shall include providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim. 38 U.S.C.A. § 5103A(d) (West 2002); 38 C.F.R. § 3.159(c)(4) (2003. The RO did not afford the appellant a VA examination in this case. The adjudication here revolved on the question of the

appellant's service in the waters off Vietnam in the late 1960s, and there was no need for medical information on the current status of his diabetic disorder or on whether such a disorder was linked to herbicide exposure.

Finally, in the August 2001 letter sent to the appellant prior to the first adjudication of his claim by the RO, he was asked to provide other medical records he wanted VA to review. He was also asked to let the RO know if he had no additional records by responding with a statement provided to him with a postage-paid envelope. The appellant did not return the letter.

On appellate review, the Board sees no areas in which further development may be fruitful. The requirements of the VCAA have been substantially met by the RO.

ORDER

Service connection for type-II diabetes mellitus with peripheral neuropathy, nephropathy, and retinopathy, claimed as loss of eyesight, all secondary to exposure to herbicide agents, is denied.

/s/ Marjorie A. Auer'
MARJORIE A. AUER
Veterans Law Judge, Board of Veterans' Appeals

APPENDIX E

DEPARTMENT OF VETERANS AFFAIRS
REGIONAL OFFICE
3225 N Central Ave
Phoenix AZ 85012

Jonathan L. Haas

VA File Number
24 699 165

Rating Decision
May 8, 2002

INTRODUCTION

Jonathan Haas is a Vietnam Era and Peacetime veteran. He served in the Navy from August 7, 1959 to September 6, 1964 and from May 27, 1963 to June 15, 1970. He filed an original disability claim that was received on July 27, 2001. This claim has been developed in full compliance with the provisions and requirements of the Veterans Claims Assistance Act of 2000/Public Law 106-475.

DECISION

Service connection for type 2 diabetes with peripheral neuropathy, nephropathy and retinopathy (claimed as loss of eyesight) is denied.

EVIDENCE

Veteran's original application received July 27, 2001 and service medical records for the period May 26,1955 to September 10, 1978 (active duty and reserve service).

- August 2, 2001 telephone report of contact with the veteran clarifying he is claiming his disabilities as due to Agent Orange exposure.
- VA Medical Center Phoenix treatment records for the period May 9, 2000 to March 30, 2002.
- Veteran's military, personnel file.
- VA letter of August 2, 2001 informed the veteran of the requirements to establish service connection for diabetes due to herbicide exposure in Vietnam.
- Response from veteran dated August 4, 2001, taking exception to VA's criteria regarding service in Vietnam.
- Letters from veteran dated August 8, 2001 to Congressman Shadegg and Senator McCain, again referring to the criteria to establish service connection for diabetes on a presumptive basis.
- September 27, 2001 VA report of contact with the veteran.
- Letter from veteran dated September 28, 2001, again taking exception to VA's criteria - as to service in Vietnam.
- Letter from veteran dated January 25, 2002 to Anthony J. Principi, Secretary of Veterans Affairs.
- May 7, 2002 report of contact with the veteran.
- Excerpts from 38 CFR 3.307(a)(6)(iii), 38 USC 1116(a)(3) and VA General Counsel Memorandum dated September 13, 1996.

REASONS FOR DECISION

Service connection for type 2 diabetes with peripheral neuropathy, nephropathy and retinopathy (claimed as loss of eyesight) as a result of exposure to herbicides.

FACTS: November 9, 2000, the Acting Secretary, Department of Vents Affairs, announced the determination there is a positive association between Type 2 diabetes (formerly called adult onset or noninsulin dependent) and the herbicides used in Vietnam. Veterans affected are those honorably discharged who served in the Republic of Vietnam during the period January 9, 1962 through May 7, 1975 and have adult onset diabetes mellitus, now known as Type 2 diabetes. A final regulatory amendment to 38 CFR 3.309(e), adding Type 2 diabetes to VA's list of diseases for which VA allows presumptive service-connection based on herbicide exposure was published in the Federal Register pages 23166-23169, on May 9, 2001. The effective date of this regulation is July 9, 2001.

The veteran has filed a claim for diabetes and its manifestations. His service medical records are silent for the condition. On his original application, he initially claimed his disabilities are due to exposure to Agent Orange and/or radiation exposure. We called him on August 2, 2001 and he made it clear he is seeking service connection for diabetes and its manifestations based on herbicide exposure in Vietnam. VA Medical Center Phoenix records reviewed confirm he has diabetes and there is peripheral neuropathy involving both hands and both feet. The records also show diabetic nephropathy and retinopathy. We see he had cataracts removed in the 1990s.

Our letter of August 2, 2001 explained the criteria to establish service connection for diabetes on a presumptive basis due to herbicide exposure. The veteran has taken exception to the following statement in the letter: "Veterans who are affected are those honorably discharged veterans who served in the Republic of Vietnam' (RPV) during the period January 9, 1962 through May 7, 1975 and have "adult onset diabetes mellitus." You must have physically served or visited in the Republic of Vietnam, including service in the waters offshore if the conditions of service involved duty or visitation in Vietnam. This means the ship must have come to port in the RPV and you disembarked."

The crux of his contention is the fact current VA policy mandates actually having set foot on shore, not just serving in the waters offshore. He freely admits never having actually disembarked as he served on an ammunition ship and resupplied boats and ships with ammunition, food, stores and fuel. He wrote, "Ammunition ships and tankers did not enter the ports of Vietnam due to the risks of explosion due to enemy fire or sabotage." He also has pointed out be received hazardous duty/combat pay for his service there and this should therefore qualify him for service in Vietnam. The service department has confirmed several periods of Vietnam service and we see he received 4 awards of the Vietnam Service Medal. A September 27, 2001 telephone contact report noted his Contention he was exposed to Agent Orange offshore from air currents and, although his ammunition ship did not enter Vietnamese ports, sometimes they were within a 100 feet of shore.

He has written several letters, to include letters to Secretary Principi, Senator McCain and Congress-

man-Hayworth; all essentially contending his service in the waters offshore should count towards service in Vietnam to establish service connection for diabetes and its manifestations of neuropathy, nephropathy and eyesight problems, etc. He has pointed out the wording in both 38 USC 1116(a)(3) and 38 CFR 3.307(a)(6)(iii).

From 38 USC 1116(a)(3): ". . . a veteran who, during active military, naval, or air service served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975, and has a disease referred to in paragraph (1)(B) of this subsection shall be presumed to have been exposed during such service to an herbicide agent containing dioxin or 2,4-dichlorophenoxyacetic acid, and may be presumed to have been exposed during such service to any other chemical compound in an herbicide agent, unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during service."

From 38 CFR 3.307(a)(6)(iii): "Service in the Republic of Vietnam includes service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam." The veteran contends VA policy mandating actually having set foot in Vietnam is directly at odds with 38 CFR 3.307.

A September 13, 1996 VA General Counsel memorandum offers the following opinion and it is based on this opinion current policy dictates actually having set foot on to Vietnam as opposed to serving in the waters offshore. "The provision in question, as it originally appeared in former 38 CFR 3.311a(a)(1) (1986), included a comma after the word "locations". This punctuation, which serves to separate the sub-

sequent term from those immediately preceding the comma, suggests that the phrase, "if the conditions of service involved duty or visitation in the Republic of Vietnam" is not tied exclusively to the immediately preceding phrase, but, rather, refers to both "service in the waters offshore", and "service in other locations". In addition, the preamble to the Federal Register notice proposing issuance of section 3.311a(a)(1) appears to support this interpretation, stating, "[b]ecause some military personnel stationed elsewhere may have been present in the Republic of Vietnam, service in the Republic of Vietnam, will encompass services elsewhere if the person concerned actually was in the Republic of Vietnam, however briefly. 50 Fed. Reg. 15,848, 15,849 (1985). Moreover, since application of herbicides would not have occurred in waters off the shore of Vietnam, limiting the scope of the term "[s]ervice in the Republic of Vietnam" to persons whose service involved duty or visitation in the Republic of Vietnam would focus the coverage of the regulations on persons who may have been in areas where herbicides could have been encountered.

"When title 38 of the Code of Federal Regulations was amended in 1994 to delete former 38 CFR 3.311a and incorporate certain provisions of that regulation into section 3.307, the comma following "locations" was dropped from the provision in question. However; the Federal Register notices proposing and adopting-that change give no suggestion that a change in the meaning of the provision was intended. See 58 Fed. Reg. 50,528, 50,529 (1993); 59 Fed. Reg. 5106 (1994). Thus, we believe that the phrase "(s)ervice in the Republic of Vietnam", as used in section 3.307(a)(6)(iii) does not include veterans who served aboard ships off the coast of Vietnam but

whose service did not involve duty or visitation in the Republic of Vietnam."

ANALYSIS: Under the authority granted by the Agent Orange Act of 1991, VA. has determined that presumption of service connection based on exposure to herbicides used in Vietnam is not warranted for any conditions other than those for which VA has found a positive association between the condition and such exposure. VA has determined that a positive association exists between exposure to herbicides and the subsequent development of the following ten conditions: chloracne, non-Hodgkin's lymphoma, soft tissue sarcoma, Hodgkin's disease, porphyria cutanea tarda (PCT), multiple myeloma, acute and subacute peripheral neuropathy, prostate cancer, cancers of the lung, bronchus, larynx and trachea, and Type II (adult-onset) diabetes mellitus. PCT, chloracne, and acute and subacute peripheral neuropathy are required to become manifest to a compensable degree within one year from last exposure.

Service connection may be established based on a relationship to herbicide exposure only if evidence demonstrates that the veteran either served in Vietnam during the Vietnam era or was exposed to herbicides through some other military experience. The required service in Vietnam is not shown, nor is there evidence of exposure to herbicides in any other period of service.

Until such time as we hear otherwise, the General Counsel September 1996 opinion to the effect service in Vietnam actually means having set foot on shore is still for application and service connection for diabetes and its manifestations must therefore be denied. Since herbicide exposure is not automatically presumed for veterans who served off shore, the

veteran needs to furnish evidence he was actually exposed to Agent Orange in service.

REFERENCES:

Title 38 of the Code of Federal Regulations, Pensions, Bonuses and Veterans' Relief contains the regulations of the Department of Veterans Affairs which govern entitlement to all veteran benefits. For additional information regarding applicable laws and regulations, please consult your local library, or visit us at our web site, www.va.gov.

Rating Decision	***Department of Veterans Affairs REGIONAL OFFICE***		Page 1 05/08/2002	
NAME OF VETERAN Jonathan L. Haas	VA FILE NUMBER 24 699 165	SOCIAL SECURITY NR 463-56-0627	POA	COPY TO

ACTIVE DUTY			
EOD	RAD	BRANCH	CHARACTER OF DISCHARGE
08/07/1959	09/06/1960	Navy	Honorable
05/27/1963	06/15/1970	Navy	Honorable

LEGACY CODES			
ADD'L SVC CODE	COMBAT CODE	SPECIAL PROV CDE	FUTURE EXAM DATE
	1		NONE

JURISDICTION: Original Disability Claim Received 07/27/2001

NOT SERVICE CONNECTED/NOT SUBJECT TO COMPENSATION (8.NSC Peacetime, Vietnam Era)

7913 TYPE 2 DIABETES WITH PERIPHERAL, NEURAPATHY, NEPHROPATHY, RETINOPATHY (CLAIMED AS LOSS OF SIGHT) (HERBICIDE)
Not Service Connected, Not Established by Presumption

S. Gill

APPENDIX F

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2007-7037

JONATHAN L. HAAS,
Claimant-Appellee,

v.

JAMES B. PEAKE, M.D., Secretary of Veterans Affairs,
Respondent-Appellant.

Appeal from the United States Court of Appeals for Veterans Claims in 04-0491,
Judge William A. Moorman

ORDER

A combined petition for panel rehearing and for rehearing en bane having been filed by the Appellee,* and a response thereto having been invited by the court and filed by the Appellant, and the petition for rehearing and response, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en bane and response having been referred to the circuit judges who are in regular active service,

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* Amici Curiae, Patricia McCulley and the American Legion, et al. were granted leave to file briefs in support of the Appellee's combined petition for panel rehearing and for rehearing en bane.

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en bane be, and the same hereby is, DENIED. The mandate of the court will issue on October 16, 2008.

Judge Fogel would grant the petition for rehearing and respectfully recommends that the full court grant rehearing en bane.

FOR THE COURT,

Jan Horbaly
Clerk

Dated: 10/09/2008

cc: Todd M. Hughes
Stephen B. Kinnaird
Stanley J. Panikowski, John B. Wells

HAAS V DVA, 2007-7037
(CVA - 04-0491)

APPENDIX G

UNITED STATES PUBLIC LAWS
102nd Congress - First Session
Convening January 3, 1991

PL 102-4 (HR 556)
AGENT ORANGE ACT OF 1991

February 6, 1991

Additions and Deletions are not identified in this document. For Legislative History of Act, see LH database or Report for this Public Law in U.S.C.C. & A.N. Legislative History section.

An Act to provide for the Secretary of Veterans Affairs to obtain independent scientific review of the available scientific evidence regarding associations between diseases and exposure to dioxin and other chemical compounds in herbicides, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Agent Orange Act of 1991".

SEC. 2. PRESUMPTION OF SERVICE CONNECTION FOR DISEASES ASSOCIATED WITH EXPOSURE TO CERTAIN HERBICIDE AGENTS.

(a) IN GENERAL.—(1) Chapter 11 of title 38, United States Code, is amended by adding at the end of subchapter II the following new section:

"§ 316. Presumptions of service connection for diseases associated with exposure to certain herbicide agents "(a)(1) For the purposes of section 310 of this title, and subject to section 313 of this title—"(A) a disease specified in paragraph (2) of this subsection becoming manifest as specified in that paragraph in a veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the Vietnam era; and

"(B) each additional disease (if any) that (1) the Secretary determines in regulations prescribed under this section warrants a presumption of service-connection by reason of having positive association with exposure to an herbicide agent, and (2) becomes manifest within the period (if any) prescribed in such regulations in a veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the Vietnam era and while so serving was exposed to that herbicide agent, shall be considered to have been incurred in or aggravated by such service, notwithstanding that there is no record of evidence of such disease during the period of such service.

"(2) The diseases referred to in paragraph (1)(A) of this subsection are the following:

"(A) Non-Hodgkin's lymphoma becoming manifest to a degree of disability of 10 percent or more.

"(B) Each soft-tissue sarcoma becoming manifest to a degree of disability of 10 percent or more other than osteosarcoma, chondrosarcoma, Kaposi's sarcoma, or mesothelioma.

"(C) Chloracne or another acneform disease consistent with chloracne becoming manifest to a degree of disability of 10 percent or more within one year after the last date on which the veteran performed active military, naval, or air service in the Republic of Vietnam during the Vietnam era.

"(3) For the purposes of this subsection, a veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the Vietnam era and has a disease referred to in paragraph (1)(B) of this subsection shall be presumed to have been exposed during such service to an herbicide agent containing dioxin or 2,4-dichlorophenoxyacetic acid, and may be presumed to have been exposed during such service to any other chemical compound in an herbicide agent, unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service.

"(4) For purposes of this section, the term 'herbicide agent' means a chemical in an herbicide used in support of the United States and allied military operations in the Republic of Vietnam during the Vietnam era.

"(b)(1) Whenever the Secretary determines, on the basis of sound medical and scientific evidence, that a positive association exists between (A) the exposure of humans to an herbicide agent, and (B) the occurrence of a disease in humans, the Secretary shall prescribe regulations providing that a presumption of service connection is warranted for that disease for the purposes of this section.

"(2)In making determinations for the purpose of this subsection, the Secretary shall take

into account (A) reports received by the Secretary from the National Academy of Sciences under section 3 of the Agent Orange Act of 1991, and (B) all other sound medical and scientific information and analyses available to the Secretary. In evaluating any study for the purpose of making such determinations, the Secretary shall take into consideration whether the results are statistically significant, are capable of replication, and withstand peer review.

"(3)An association between the occurrence of a disease in humans and exposure to an herbicide agent shall be considered to be positive for the purposes of this section if the credible evidence for the association is equal to or outweighs the credible evidence against the association.

"(c)(1)(A) Not later than 60 days after the date on which the Secretary receives a report from the National Academy of Sciences under section 3 of the Agent Orange Act of 1991, the Secretary shall determine whether a presumption of service connection is warranted for each disease covered by the report. If the Secretary determines that such a presumption is warranted, the Secretary, not later than 60 days after making the determination, shall issue proposed regulations setting forth the Secretary's determination.

"(B) If the Secretary determines that a presumption of service connection is not warranted, the Secretary, not later than 60 days after making the determination,

shall publish in the Federal Register a notice of that determination. The notice shall include an explanation of the scientific basis for that determination. If the disease already is included in regulations providing for a presumption of service connection, the Secretary, not later than 60 days after publication of the notice of a determination that the presumption is not warranted, shall issue proposed regulations removing the presumption for the disease.

"(2) Not later than 90 days after the date on which the Secretary issues any proposed regulations under this subsection, the Secretary shall issue final regulations. Such regulations shall be effective on the date of issuance.

"(d)Whenever a disease is removed from regulations prescribed under this section—

"(1) a veteran who was awarded compensation for such disease on the basis of the presumption provided in subsection (a) before the effective date of the removal shall continue to be entitled to receive compensation on that basis; and

"(2) a survivor of a veteran who was awarded dependency and indemnity compensation for the death of a veteran resulting from such disease on the basis of such presumption shall continue to be entitled to receive dependency and indemnity compensation on such basis.

"(e) Subsections (b) through (d) shall cease to be effective 10 years after the first day of the fiscal year in which the National Academy of Sciences transmits to the Secretary the first report under section 3 of the Agent Orange Act of 1991.".

(2) The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 315 the following new item:

"316. Presumptions of service connection for diseases associated with exposure to certain herbicide agents."

(b) CONFORMING AMENDMENT.—Section 313 of title 38, United States Code, is amended by inserting "or 316" after "section 312" each place it appears.

SEC. 3. AGREEMENT WITH NATIONAL ACADEMY OF SCIENCES.

(a) PURPOSE.—The purpose of this section is to provide for the National Academy of Sciences, an independent nonprofit scientific organization with appropriate expertise which is not part of the Federal Government, to review and evaluate the available scientific evidence regarding associations between diseases and exposure to dioxin and other chemical compounds in herbicides.

(b) AGREEMENT.—The Secretary shall seek to enter into an agreement with the National Academy of Sciences for the Academy to perform the services covered by this section. The Secretary shall seek to enter into such agree-

ment not later than two months after the date of the enactment of this Act.

(c) REVIEW OF SCIENTIFIC EVIDENCE.—Under an agreement between the Secretary and the National Academy of Sciences under this section, the Academy shall review and summarize the scientific evidence, and assess the strength thereof, concerning the association between exposure to an herbicide used in support of the United States and allied military operations in the Republic of Vietnam during the Vietnam era and each disease suspected to be associated with such exposure.

(d) SCIENTIFIC DETERMINATIONS CONCERNING DISEASES.—(1) For each disease reviewed, the Academy shall determine (to the extent that available scientific data permit meaningful determinations)—

(A) whether a statistical association with herbicide exposure exists, taking into account the strength of the scientific evidence and the appropriateness of the statistical and epidemiological methods used to detect the association;

(B) the increased risk of the disease among those exposed to herbicides during service in the Republic of Vietnam during the Vietnam era; and

(C) whether there exists a plausible biological mechanism or other evidence of a causal relationship between herbicide exposure and the disease.

(2) The Academy shall include in its reports under subsection (g) a full discussion of the scientific evidence and reasoning that led to its conclusions under this subsection.

(e) RECOMMENDATIONS FOR ADDITIONAL SCIENTIFIC STUDIES.—The Academy shall make any recommendations it has for additional scientific studies to resolve areas of continuing scientific uncertainty relating to herbicide exposure. In making recommendations for further study, the Academy shall consider the scientific information that is currently available, the value and relevance of the information that could result from additional studies, and the cost and feasibility of carrying out such additional studies.

(f) SUBSEQUENT REVIEWS.—An agreement under subsection (b) shall require the National Academy of Sciences—

(1) to conduct as comprehensive a review as is practicable of the evidence referred to in subsection (c) that became available since the last review of such evidence under this section; and

(2) to make its determinations and estimates on the basis of the results of such review and all other reviews conducted for the purposes of this section.

(g) REPORTS.—(1) The agreement between the Secretary and the National Academy of Sciences shall require the Academy to transmit to the Secretary and the Commit-

tees on Veterans' Affairs of the Senate and House of Representatives periodic written reports regarding the Academy's activities under the agreement. Such reports shall be submitted at least once every two years (as measured from the date of the first report).

(2) The first report under this subsection shall be transmitted not later than the end of the 18-month period beginning on the date of the enactment of this Act. That report shall include (A) the determinations and discussion referred to in subsection (d), (B) any recommendations of the Academy under subsection (e), and (C) the recommendation of the Academy as to whether the provisions of each of sections 6 through 9 should be implemented by the Secretary. In making its recommendation with respect to each such section, the Academy shall consider the scientific information that is currently available, the value and relevance of the information that could result from implementing that section, and the cost and feasibility of implementing that section. If the Academy recommends that the provisions of section 6 should be implemented, the Academy shall also recommend the means by which clinical data referred to in that section could be maintained in the most scientifically useful way.

(h) LIMITATION ON AUTHORITY.—The authority to enter into agreements under this section shall be effective for a fiscal year to

the extent that appropriations are available.

(i) SUNSET.—This section shall cease to be effective 10 years after the last day of the fiscal year in which the National Academy of Sciences transmits to the Secretary the first report under subsection (g).

(j) ALTERNATIVE CONTRACT SCIENTIFIC ORGANIZATION.—If the Secretary is unable within the time period prescribed in subsection (b) to enter into an agreement with the National Academy of Sciences for the purposes of this section on terms acceptable to the Secretary, the Secretary shall seek to enter into an agreement for the purposes of this section with another appropriate scientific organization that is not part of the Government and operates as a not-for-profit entity and that has expertise and objectivity comparable to that of the National Academy of Sciences. If the Secretary enters into such an agreement with another organization, then any reference in this section and in section 316 of title 38, United States Code (as added by section 2), to the National Academy of Sciences shall be treated as a reference to the other organization.

SEC. 4. OUTREACH SERVICES.

Section 1204(a) of the Veterans' Benefits Improvement Act of 1988 (division B of Public Law 100-687; 102 Stat. 4125) is amended—

(1) in clause (1), by striking out ", as such information on health risks becomes known";

(2) by redesignating clauses (1) and (2) as clauses (A) and (B), respectively;

(3) by inserting "(1)" after "PROGRAM.—"; and

(4) by adding at the end the following new paragraph:

"(2)The Secretary of Veterans Affairs shall annually furnish updated information on health risks described in paragraph (1)(A) to veterans referred to in paragraph (1)."

SEC. 5. EXTENSION OF HEALTH-CARE ELIGIBILITY BASED ON EXPOSURE TO AGENT ORANGE OR IONIZING RADIATION.

Section 610(e)(3) of title 38, United States Code, is amended by striking out "December 31, 1990" and inserting in lieu thereof "December 31, 1993".

SEC. 6. RESULTS OF EXAMINATIONS AND TREATMENT OF VETERANS FOR DISABILITIES RELATED TO EXPOSURE TO CERTAIN HERBICIDES OR TO SERVICE IN VIETNAM.

(a) IN GENERAL.—Subject to subsections (d) and (e), the Secretary of Veterans Affairs shall compile and analyze, on a continuing basis, all clinical data that (1) is obtained by the Department of Veterans Affairs in connection with examinations and treatment furnished to veterans by the Department after November 3, 1981, by reason of eligibility provided in section 610(e)(1)(A) of title 38, United States Code, and (2) is likely to be scientifically useful in determining the association, if any, between the disabilities of veterans referred to in such section and exposure to dioxin or any other toxic substance referred to in such section or

between such disabilities and active military, naval, or air service in the Republic of Vietnam during the Vietnam era.

(b) ANNUAL REPORT.—The Secretary shall submit to the Committees on Veterans' Affairs of the Senate and the House of Representatives an annual report containing—

(1) the information compiled in accordance with subsection (a);

(2) the Secretary's analysis of such information;

(3) a discussion of the types and incidences of disabilities identified by the Department of Veterans Affairs in the case of veterans referred to in subsection (a);

(4) the Secretary's explanation for the incidence of such disabilities;

(5) other explanations for the incidence of such disabilities considered reasonable by the Secretary; and

(6) the Secretary's views on the scientific validity of drawing conclusions from the incidence of such disabilities, as evidenced by the data compiled under subsection (a), about any association between such disabilities and exposure to dioxin or any other toxic substance referred to in section 610(e)(1)(A) of title 38, United States Code, or between such disabilities and active military, naval, or air service, in the Republic of Vietnam during the Vietnam era.

(c) FIRST REPORT.—The first report under subsection (b) shall be submitted not later than one year after the effective date of this section.

(d) FUNDING.—The authority of the Secretary to carry out this section is effective in any fiscal year only to the extent or in the amount specifically provided in statutory language in appropriations Acts.

(e) EFFECTIVE DATE.—(1) This section shall take effect at the end of the 90- day period beginning on the date on which the first report of the National Academy of Sciences under section 3(g) is received by the Secretary, except that this section shall not take effect if the Secretary, after receiving that report and before the end of that 90-day period—

(A) determines that it is not feasible or cost-effective to carry out this section or that carrying out this section would not make a material contribution to the body of scientific knowledge concerning the health effects in humans of herbicide exposure; and

(B) notifies the Committees on Veterans' Affairs of the Senate and House of Representatives of the Secretary's determination and the reasons therefor.

(2) In making a determination under this subsection, the Secretary shall give great weight to the views and recommendations of the Academy expressed in that report with respect to the implementation of this section.

SEC. 7. TISSUE ARCHIVING SYSTEM.

(a) ESTABLISHMENT OF SYSTEM.—Subject to subsections (e) and (f), for the purpose of facilitating future scientific research on the effects of exposure of veterans to dioxin and other toxic agents in herbicides used in support of United States and allied military operations in the Republic of Vietnam during the Vietnam era, the Secretary of Veterans Affairs shall establish and maintain a system for the collection and storage of voluntarily contributed samples of blood and tissue of veterans who performed active military, naval, or air service in the Republic of Vietnam during the Vietnam era.

(b) SECURITY OF SPECIMENS.—The Secretary shall ensure that the tissue is collected and stored under physically secure conditions and that the tissue is maintained in a condition that is useful for research referred to in subsection (a).

(c) AUTHORIZED USE OF SPECIMENS.—The Secretary may make blood and tissue available from the system for research referred to in subsection (a). The Secretary shall carry out this section in a manner consistent with the privacy rights and interests of the blood and tissue donors.

(d) LIMITATIONS ON ACCEPTANCE OF SAMPLES.—The Secretary may prescribe such limitations on the acceptance and storage of blood and tissue samples as the Secretary considers appropriate consistent with the purpose specified in subsection (a).

(e) FUNDING.—The authority of the Secretary to carry out this section is effective in any fiscal year only to the extent or in the amount specifically provided in statutory language in appropriations Acts.

(f) EFFECTIVE DATE.—(1) This section shall take effect at the end of the 90-day period beginning on the date on which the first report of the National Academy of Sciences under section 3(g) is received by the Secretary, except that this section shall not take effect if the Secretary, after receiving that report and before the end of that 90-day period—

(A) determines that it is not feasible or cost-effective to carry out this section or that carrying out this section would not make a material contribution to the body of scientific knowledge concerning the health effects in humans of herbicide exposure; and

(B) notifies the Committees on Veterans' Affairs of the Senate and House of Representatives of the Secretary's determination and the reasons therefor.

(2) In making a determination under this subsection, the Secretary shall give great weight to the views and recommendations of the Academy expressed in that report with respect to the implementation of this section.

SEC. 8. SCIENTIFIC RESEARCH FEASIBILITY STUDIES PROGRAM.

(a) ESTABLISHMENT OF PROGRAM.—Subject to subsections (e) and (f), the Secretary of Vet-

erans Affairs shall establish a program to provide for the conduct of studies of the feasibility of conducting additional scientific research on—

(1) health hazards resulting from exposure to dioxin;

(2) health hazards resulting from exposure to other toxic agents in herbicides used in support of United States and allied military operations in the Republic of Vietnam during the Vietnam era; and

(3) health hazards resulting from active military, naval, or air service in the Republic of Vietnam during the Vietnam era.

(b) PROGRAM REQUIREMENTS.—(1) Under the program established pursuant to subsection (a), the Secretary shall, pursuant to criteria prescribed pursuant to paragraph (2), award contracts or furnish financial assistance to non-Government entities for the conduct of studies referred to in subsection (a).

(2) The Secretary shall prescribe criteria for (A) the selection of entities to be awarded contracts or to receive financial assistance under the program, and (B) the approval of studies to be conducted under such contracts or with such financial assistance.

(c) REPORT.—The Secretary shall promptly report the results of studies conducted under the program to the Committees on Veterans' Affairs of the Senate and the House of Representatives.

(d) CONSULTATION WITH THE NATIONAL ACADEMY OF SCIENCES.—(1) To the extent provided under any agreement entered into by the Secretary and the National Academy of Sciences under this Act—

(A) the Secretary shall consult with the Academy regarding the establishment and administration of the program under subsection (a); and

(B) the Academy shall review the studies conducted under contracts awarded pursuant to the program and the studies conducted with financial assistance furnished pursuant to the program.

(2) The agreement shall require the Academy to submit to the Secretary and the Committees on Veterans' Affairs of the Senate and the House of Representatives any recommendations that the Academy considers appropriate regarding any studies reviewed under the agreement.

(e) FUNDING.—The authority of the Secretary to carry out this section is effective in any fiscal year only to the extent or in the amount specifically provided in statutory language in appropriations Acts.

(f) EFFECTIVE DATE.—(1) This section shall take effect at the end of the 90- day period beginning on the date on which the first report of the National Academy of Sciences under section 3(g) is received by the Secretary, except that this section shall not take effect if the

Secretary, after receiving that report and before the end of that 90-day period—

(A) determines that it is not feasible or cost-effective to carry out this section or that carrying out this section would not make a material contribution to the body of scientific knowledge concerning the health effects in humans of herbicide exposure; and

(B) notifies the Committees on Veterans' Affairs of the Senate and House of Representatives of the Secretary's determination and the reasons therefor.

(2) In making a determination under this subsection, the Secretary shall give great weight to the views and recommendations of the Academy expressed in that report with respect to the implementation of this section.

SEC. 9. BLOOD TESTING OF CERTAIN VIETNAM-ERA VETERANS.

(a) BLOOD TESTING.—Subject to subsections (d) and (e), in the case of a veteran described in section 610(e)(1)(A) of title 38, United States Code, who—

(1) has applied for medical care from the Department of Veterans Affairs; or

(2) has filed a claim for, or is in receipt of disability compensation under chapter 11 of title 38, United States Code, the Secretary of Veterans Affairs shall, upon the veteran's request, obtain a sufficient amount of blood serum from the veteran to enable the Secre-

tary to conduct a test of the serum to ascertain the level of 2,3,7,8- tetrachlorodibenzo-p-dioxin (TCDD) which may be present in the veteran's body.

(b) NOTIFICATION OF TEST RESULTS.—Upon completion of such test, the Secretary shall notify the veteran of the test results and provide the veteran a complete explanation as to what, if anything, the results of the test indicate regarding the likelihood of the veteran's exposure to TCDD while serving in the Republic of Vietnam.

(c) INCORPORATION IN SYSTEM.—The Secretary shall maintain the veteran's blood sample and the results of the test as part of the system required by section 7.

(d) FUNDING.—The authority of the Secretary to carry out this section is effective in any fiscal year only to the extent or in the amount specifically provided in statutory language in appropriations Acts, but such amount shall not exceed $4,000,000 in any fiscal year.

(e) EFFECTIVE DATE.—(1) This section shall take effect at the end of the 90- day period beginning on the date on which the first report of the National Academy of Sciences under section 3(g) is received by the Secretary, except that this section shall not take effect if the Secretary, after receiving that report and before the end of that 90-day period—

(A) determines that it is not feasible or cost-effective to carry out this section or that carrying out this section would not make a material contribution to the body of

scientific knowledge concerning the health effects in humans of herbicide exposure; and

(B) notifies the Committees on Veterans' Affairs of the Senate and House of Representatives of the Secretary's determination and the reasons therefor.

(2) In making a determination under this subsection, the Secretary shall give great weight to the views and recommendations of the Academy expressed in that report with respect to the implementation of this section.

SEC. 10. CONFORMING AMENDMENTS TO PUBLIC LAW 98-542.

(a) AMENDMENTS TO SECTION 2.—Section 2 of Public Law 98-542 (38 U.S.C. 354 note) is amended by striking out "that chloracne," in paragraph (5) and all that follows through "herbicides and".

(b) AMENDMENTS TO SECTION 3.—Section 3 of such Public Law is amended by striking out "during service in the Armed Forces in the Republic of Vietnam to a herbicide containing dioxin or".

(c) AMENDMENTS TO SECTION 5.—Section 5 of such Public Law is amended as follows:

(1) Subsection (a)(1) is amended by striking out "during service—" and all that follows through "in connection with" and inserting in lieu thereof "during service in connection with".

(2) Subsection (b) is amended—

(A) by striking out "of exposure to herbicides containing dioxin or" in the first sentence of paragraph (1)(A);

(B) by striking out "evidence indicating—" in paragraph (2)(B) and all that follows through "(ii) a connection to" and inserting in lieu thereof "evidence indicating a connection to";

(C) in paragraph (3)—

(i) by striking out "herbicide or" in subparagraph (A); and

(ii) by striking out "to a herbicide containing dioxin or" in subparagraph (B); and

(D) by striking out "of the appropriate panel" in the first sentence of paragraph (1)(B), in the first sentence of paragraph (2)(A)(i), and in paragraph (2)(B).

(d) AMENDMENTS TO SECTION 6.—Section 6 of such Public Law is amended as follows:

(1) Subsection (a) is amended—

(A) in the matter preceding paragraph (1), by striking out "fifteen members" and inserting in lieu thereof "nine members";

(B) in paragraph (1)—

(i) by striking out "eleven individuals" and inserting in lieu thereof "six individuals";

(ii) by striking out subparagraph (A);

(iii) by redesignating subparagraph (B) as subparagraph (A); and

(iv) by redesignating subparagraph (C) as subparagraph (B) and in that subparagraph—

(I) by striking out "five individuals" and inserting in lieu thereof "three individuals"; and

(II) by striking out "dioxin or"; and

(C) in paragraph (2)—

(i) by striking out "four individuals" and inserting in lieu thereof "three individuals"; and

(ii) by striking out "dioxin or".

(2) Subsection (d) is amended—

(A) by striking out "eleven" in paragraph (1) and inserting in lieu thereof "six"; and

(B) by striking out "be divided into" in paragraph (2) and all that follows through "(B) an eight-member panel with" and inserting in lieu thereof "have".

(e) EFFECTIVE DATE.—(1) Except as provided in paragraph (2), the amendments made by this section shall take effect at the end of the six-month period beginning on the date of the enactment of this Act.

(2)(A) If the Secretary of Veterans Affairs determines before the end of such six-month period that the Environmental Hazards Advisory Committee established under section 6 of Public Law 98-542 (38 U.S.C. 354 note) has completed its responsibilities under that section and the directives of the Secretary pursuant to the Nehmer case

court order, the amendments made by this section shall take effect as of the date of such determination.

(B) For purposes of this paragraph, the term "Nehmer case court order" means the court order dated May 2, 1989, in the case of Nehmer v. Department of Veterans Affairs, in the United States district court for the northern district of California (civil action docket number C-86-6160 TEH).

(3) If the Secretary makes a determination under paragraph (2), the Secretary shall promptly publish in the Federal Register a notice that such determination has been made and that such amendments have thereby taken effect as of the date of such determination.

Approved February 6, 1991

PL 102-4, 1991 HR 556

APPENDIX H

Effective: January 1, 2002

UNITED STATES CODE ANNOTATED

Title 38—Veterans' Benefits

Part II—General Benefits

Chapter 11.—Compensation for Service-Connected Disability or Death

Subchapter II.—Wartime Disability Compensation

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§ 1116. Presumptions of service connection for diseases associated with exposure to certain herbicide agents; presumption of exposure for veterans who served in the Republic of Vietnam.

(a)(1) For the purposes of section 1110 of this title, and subject to section 1113 of this title

(A) a disease specified in paragraph (2) of this subsection becoming manifest as specified in that paragraph in a veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975; and

(B) each additional disease (if any) that (i) the Secretary determines in regulations prescribed under this section warrants a presumption of service-connection by reason of having positive association with exposure to an herbicide agent, and (ii) becomes manifest within the period (if any) prescribed in such regulations in a veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the period beginning on January 9, 1962,

and ending on May 7, 1975, and while so serving was exposed to that herbicide agent.

shall be considered to have been incurred in or aggravated by such service, notwithstanding that there is no record of evidence of such disease during the period of such service.

(2) The diseases referred to in paragraph (1)(A) of this subsection are the following:

(A) Non-Hodgkin's lymphoma becoming manifest to a degree of disability of 10 percent or more.

(B) Each soft-tissue sarcoma becoming manifest to a degree of disability of 10 percent or more other than osteosarcoma, chondrosarcoma, Kaposi's sarcoma, or mesothelioma.

(C) Chloracne or another acneform disease consistent with chloracne becoming manifest to a degree of disability of 10 percent or more within one year after the last date on which the veteran performed active military, naval, or air service in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975.

(D) Hodgkin's disease becoming manifest to a degree of disability of 10 percent or more.

(E) Porphyria cutanea tarda becoming manifest to a degree of disability of 10 percent or more within a year after the last date on which the veteran performed active military, naval, or air service in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975.

(F) Respiratory cancers (cancer of the lung, bronchus, larynx, or trachea) becoming manifest to a degree of disability of 10 percent or more.

(G) Multiple myeloma becoming manifest to a degree of disability of 10 percent or more.

(H) Diabetes Mellitus (Type 2).

(3) For purposes of this section, the term "herbicide agent" means a chemical in an herbicide used in support of the United States and allied military operations in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975.

(b)(1) Whenever the Secretary determines, on the basis of sound medical and scientific evidence, that a positive association exists between (A) the exposure of humans to an herbicide agent, and (B) the occurrence of a disease in humans, the Secretary shall prescribe regulations providing that a presumption of service connection is warranted for that disease for the purposes of this section.

(2) In making determinations for the purpose of this subsection, the Secretary shall take into account (A) reports received by the Secretary from the National Academy of Sciences under section 3 of the Agent Orange Act of 1991, and (B) all other sound medical and scientific information and analyses available to the Secretary. In evaluating any study for the purpose of making such determinations, the Secretary shall take into consideration whether the results are statistically significant, are capable of replication, and withstand peer review.

(3) An association between the occurrence of a disease in humans and exposure to an herbicide agent shall be considered to be positive for the purposes of this section if the credible evidence for the association is equal to or outweighs the credible evidence against the association.

(c)(1)(A) Not later than 60 days after the date on which the Secretary receives a report from the National Academy of Sciences under section 3 of the Agent Orange Act of 1991, the Secretary shall determine whether a presumption of service connection is warranted for each disease covered by the report. If the Secretary determines that such a presumption is warranted, the Secretary, not later than 60 days after making the determination, shall issue proposed regulations setting forth the Secretary's determination.

(B) If the Secretary determines that a presumption of service connection is not warranted, the Secretary, not later than 60 days after making the determination, shall publish in the Federal Register a notice of that determination. The notice shall include an explanation of the scientific basis for that determination. If the disease already is included in regulations providing for a presumption of service connection, the Secretary, not later than 60 days after publication of the notice of a determination that the presumption is not warranted, shall issue proposed regulations removing the presumption for the disease.

(2) Not later than 90 days after the date on which the Secretary issues any proposed regulations under this subsection, the Secretary shall issue final regulations. Such regulations shall be effective on the date of issuance.

(d) Whenever a disease is removed from regulations prescribed under this section—

(1) a veteran who was awarded compensation for such disease on the basis of the presumption provided in subsection (a) before the effective date of the

removal shall continue to be entitled to receive compensation on that basis; and

(2) a survivor of a veteran who was awarded dependency and indemnity compensation for the death of a veteran resulting from such disease on the basis of such presumption shall continue to be entitled to receive dependency and indemnity compensation on such basis.

(e) Subsections (b) through (d) shall cease to be effective on September 30, 2015.

(f) For purposes of establishing service connection for a disability or death resulting from exposure to a herbicide agent, including a presumption of service-connection under this section, a veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975, shall be presumed to have been exposed during such service to an herbicide agent containing dioxin or 2,4-dichlorophenoxyacetic acid, and may be presumed to have been exposed during such service to any other chemical compound in an herbicide agent, unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service.

APPENDIX I

CODE OF FEDERAL REGULATIONS

Title 38.—Pensions, Bonuses, and Veterans' Relief

Chapter I.—Department of Veterans Affairs

Part 3.—Adjudication

Subpart A.—Pension, Compensation, and Dependency and Indemnity Compensation Ratings and Evaluations; Service Connection

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§ 3.307 Presumptive service connection for chronic, tropical or prisoner-of-war related disease, or disease associated with exposure to certain herbicide agents; wartime and service on or after January 1, 1947.

(a) General. A chronic, tropical, prisoner of war related disease, or a disease associated with exposure to certain herbicide agents listed in § 3.309 will be considered to have been incurred in or aggravated by service under the circumstances outlined in this section even though there is no evidence of such disease during the period of service. No condition other than one listed in § 3.309(a) will be considered chronic.

(1) Service. The veteran must have served 90 days or more during a war period or after December 31, 1946. The requirement of 90 days' service means active, continuous service within or extending into or beyond a war period, or which began before and extended beyond December 31, 1946, or began after that date. Any period of service is sufficient for the purpose of establishing the presump-

tive service connection of a specified disease under the conditions listed in § 3.309(c) and (e).

(2) Separation from service. For the purpose of paragraph (a) (3) and (4) of this section the date of separation from wartime service will be the date of discharge or release during a war period, or if service continued after the war, the end of the war period. In claims based on service on or after January 1, 1947, the date of separation will be the date of discharge or release from the period of service on which the claim is based.

(3) Chronic disease. The disease must have become manifest to a degree of 10 percent or more within 1 year (for Hansen's disease (leprosy) and tuberculosis, within 3 years; multiple sclerosis, within 7 years) from the date of separation from service as specified in paragraph (a)(2) of this section.

(4) Tropical disease. The disease must have become manifest to a degree of 10 percent or more within 1 year from date of separation from service as specified in paragraph (a)(2) of this section, or at a time when standard accepted treatises indicate that the incubation period commenced during such service. The resultant disorders or diseases originating because of therapy administered in connection with a tropical disease or as a preventative may also be service connected.

(Authority: 38 U.S.C. 1112)

(5) Diseases specific as to former prisoners of war. The diseases listed in § 3.309(c) shall have become manifest to a degree of 10 percent or more at any time after discharge or release from active service.

(Authority: 38 U.S.C. 1112)

(6) Diseases associated with exposure to certain herbicide agents.

(i) For the purposes of this section, the term "herbicide agent" means a chemical in an herbicide used in support of the United States and allied military operations in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975, specifically: 2,4-D; 2,4,5-T and its contaminant TCDD; cacodylic acid; and picloram.

(Authority: 38 U.S.C. 1116(a)(4))

(ii) The diseases listed at § 3.309(e) shall have become manifest to a degree of 10 percent or more at any time after service, except that chloracne or other acneform disease consistent with chloracne, porphyria cutanea tarda, and acute and subacute peripheral neuropathy shall have become manifest to a degree of 10 percent or more within a year after the last date on which the veteran was exposed to an herbicide agent during active military, naval, or air service.

(iii) A veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975, shall be presumed to have been exposed during such service to an herbicide agent, unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service. The last date on which such a veteran shall be presumed to have been exposed to an herbicide agent shall be the last date on which he

or she served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975. "Service in the Republic of Vietnam" includes service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam.

(Authority: 38 U.S.C. 501(a) and 1116(a)(3))

(b) Evidentiary basis. The factual basis may be established by medical evidence, competent lay evidence or both. Medical evidence should set forth the physical findings and symptomatology elicited by examination within the applicable period. Lay evidence should describe the material and relevant facts as to the veteran's disability observed within such period, not merely conclusions based upon opinion. The chronicity and continuity factors outlined in § 3.303(b) will be considered. The diseases listed in § 3.309(a) will be accepted as chronic, even though diagnosed as acute because of insidious inception and chronic development, except: (1) Where they result from intercurrent causes, for example, cerebral hemorrhage due to injury, or active nephritis or acute endocarditis due to intercurrent infection (with or without identification of the pathogenic microorganism); or (2) where a disease is the result of drug ingestion or a complication of some other condition not related to service. Thus, leukemia will be accepted as a chronic disease whether diagnosed as acute or chronic. Unless the clinical picture is clear otherwise, consideration will be given as to whether an acute condition is an exacerbation of a chronic disease.

(Authority: 38 U.S.C. 1112)

(c) Prohibition of certain presumptions. No presumptions may be invoked on the basis of advancement of the disease when first definitely diagnosed for the purpose of showing its existence to a degree of 10 percent within the applicable period. This will not be interpreted as requiring that the disease be diagnosed in the presumptive period, but only that there be then shown by acceptable medical or lay evidence characteristic manifestations of the disease to the required degree, followed without unreasonable time lapse by definite diagnosis. Symptomatology shown in the prescribed period may have no particular significance when first observed, but in the light of subsequent developments it may gain considerable significance. Cases in which a chronic condition is shown to exist within a short time following the applicable presumptive period, but without evidence of manifestations within the period, should be developed to determine whether there was symptomatology which in retrospect may be identified and evaluated as manifestation of the chronic disease to the required 10-percent degree.

(d) Rebuttal of service incurrence or aggravation.

(1) Evidence which may be considered in rebuttal of service incurrence of a disease listed in § 3.309 will be any evidence of a nature usually accepted as competent to indicate the time of existence or inception of disease, and medical judgment will be exercised in making determinations relative to the effect of intercurrent injury or disease. The expression "affirmative evidence to the contrary" will not be taken to require a conclusive showing, but such showing as would, in sound medical reasoning and in the consideration of all evidence of record, support a conclusion that the disease was not

incurred in service. As to tropical diseases the fact that the veteran had no service in a locality having a high incidence of the disease may be considered as evidence to rebut the presumption, as may residence during the period in question in a region where the particular disease is endemic. The known incubation periods of tropical diseases should be used as a factor in rebuttal of presumptive service connection as showing inception before or after service.

(2) The presumption of aggravation provided in this section may be rebutted by affirmative evidence that the preexisting condition was not aggravated by service, which may include affirmative evidence that any increase in disability was due to an intercurrent disease or injury suffered after separation from service or evidence sufficient, under § 3.306 of this part, to show that the increase in disability was due to the natural progress of the preexisting condition.

(Authority: 38 U.S.C 1113 and 1153)

[26 FR 1581, Feb. 24, 1961, as amended at 35 FR 18281, Dec. 1, 1970; 39 FR 34530, Sept. 26, 1974; 43 FR 45347, Oct. 2, 1978; 47 FR 11655, March 18, 1982; 58 FR 29109, May 19, 1993; 59 FR 5106, Feb. 3, 1994; 59 FR 29724, June 9, 1994; 61 FR 57588, Nov. 7, 1996; 62 FR 35422, July 1, 1997; 67 FR 67793, Nov. 7, 2002; 68 FR 34541, June 10, 2003]

SOURCE: 56 FR 65846, 65847, 65849, 65851, 65853, Dec. 19, 1991; 57 FR 8268, March 9, 1992; 57 FR 10425, March 26, 1992; 57 FR 59296, Dec. 15, 1992, unless otherwise noted.; 54 FR 34978, 34981, Aug. 23, 1989; 57 FR 31007, 31012, July 13, 1992; 57 FR 38610, Aug. 26, 1992, unless otherwise noted.

AUTHORITY: 38 U.S.C. 501(a).

APPENDIX J

Effective June 4, 2008

CODE OF FEDERAL REGULATIONS

Title 38.—Pensions, Bonuses, and Veterans' Relief

Chapter I.—Department of Veterans Affairs

Part 3.—Adjudication Subpart A. Pension, Compensation, and Dependency and Indemnity Compensation Ratings and Evaluations; Service Connection

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§ 3.309 Disease subject to presumptive service connection.

(a) Chronic diseases. The following diseases shall be granted service connection although not otherwise established as incurred in or aggravated by service if manifested to a compensable degree within the applicable time limits under § 3.307 following service in a period of war or following peacetime service on or after January 1, 1947, provided the rebuttable presumption provisions of § 3.307 are also satisfied.

Anemia, primary.

Arteriosclerosis.

Arthritis.

Atrophy, progressive muscular.

Brain hemorrhage.

Brain thrombosis.

Bronchiectasis.

Calculi of the kidney, bladder, or gallbladder.

Cardiovascular-renal disease, including hyperten-

sion. (This term applies to combination involvement of the type of arteriosclerosis, nephritis, and organic heart disease, and since hypertension is an early symptom long preceding the development of those diseases in their more obvious forms, a disabling hypertension within the 1-year period will be given the same benefit of service connection as any of the chronic diseases listed.)

Cirrhosis of the liver.

Coccidioidomycosis.

Diabetes mellitus.

Encephalitis lethargica residuals.

Endocarditis. (This term covers all forms of valvular heart disease.)

Endocrinopathies.

Epilepsies.

Hansen's disease.

Hodgkin's disease.

Leukemia.

Lupus erythematosus, systemic.

Myasthenia gravis.

Myelitis.

Myocarditis.

Nephritis.

Other organic diseases of the nervous system.

Osteitis deformans (Paget's disease).

Osteomalacia.

Palsy, bulbar.

Paralysis agitans.

Psychoses.

Purpura idiopathic, hemorrhagic.

Raynaud's disease.

Sarcoidosis.

Scleroderma.

Sclerosis, amyotrophic lateral.

Sclerosis, multiple.

Syringomyelia.

Thromboangiitis obliterans (Buerger's disease).

Tuberculosis, active.

Tumors, malignant, or of the brain or spinal cord or peripheral nerves.

Ulcers, peptic (gastric or duodenal) (A proper diagnosis of gastric or duodenal ulcer (peptic ulcer) is to be considered established if it represents a medically sound interpretation of sufficient clinical findings warranting such diagnosis and provides an adequate basis for a differential diagnosis from other conditions with like symptomatology; in short, where the preponderance of evidence indicates gastric or duodenal ulcer (peptic ulcer). Whenever possible, of course, laboratory findings should be used in corroboration of the clinical data.

(b) Tropical diseases. The following diseases shall be granted service connection as a result of tropical service, although not otherwise established as incurred in service if manifested to a compensable degree within the applicable time limits under § 3.307 or § 3.308 following service in a period of was or

following peacetime service, provided the rebuttable presumption provisions of § 3.307 are also satisfied.

Amebiasis.

Blackwater fever.

Cholera.

Dracontiasis.

Dysentery.

Filariasis.

Leishmaniasis, including kala-azar.

Loiasis.

Malaria.

Onchocerciasis.

Oroya fever.

Pinta.

Plague.

Schistosomiasis.

Yaws.

Yellow fever.

Resultant disorders or diseases originating because of therapy administered in connection with such diseases or as a preventative thereof.

(c) Diseases specific as to former prisoners of war.

(1) If a veteran is a former prisoner of war, the following diseases shall be service connected if manifest to a degree of disability of 10 percent or more at any time after discharge or release from active military, naval, or air service even though there is no record of such disease during service, provided

the rebuttable presumption provisions of § 3.307 are also satisfied.

Psychosis.

Any of the anxiety states.

Dysthymic disorder (or depressive neurosis).

Organic residuals of frostbite, if it is determined that the veteran was interned in climatic conditions consistent with the occurrence of frostbite.

Post-traumatic osteoarthritis.

Atherosclerotic heart disease or hypertensive vascular disease (including hypertensive heart disease) and their complications (including myocardial infarction, congestive heart failure, arrhythmia).

Stroke and its complications.

(2) If the veteran:

(i) Is a former prisoner of war and;

(ii) Was interned or detained for not less than 30 days, the following diseases shall be service connected if manifest to a degree of 10 percent or more at any time after discharge or release from active military, naval, or air service even though there is no record of such disease during service, provided the rebuttable presumption provisions of § 3.307 are also satisfied.

Avitaminosis.

Beriberi (including beriberi heart disease).

Chronic dysentery.

Helminthiasis.

Malnutrition (including optic atrophy associated with malnutrition).

Pellagra.

Any other nutritional deficiency.

Irritable bowel syndrome.

Peptic ulcer disease.

Peripheral neuropathy except where directly related to infectious causes.

Cirrhosis of the liver.

Authority: 38 U.S.C. 1112(b).

(d) Diseases specific to radiation-exposed veterans.

(1) The diseases listed in paragraph (d)(2) of this section shall be service-connected if they become manifest in a radiation-exposed veteran as defined in paragraph (d)(3) of this section, provided the rebuttable presumption provisions of § 3.307 of this part are also satisfied.

(2) The diseases referred to in paragraph (d)(1) of this section are the following:

(i) Leukemia (other than chronic lymphocytic leukemia).

(ii) Cancer of the thyroid.

(iii) Cancer of the breast.

(iv) Cancer of the pharynx.

(v) Cancer of the esophagus.

(vi) Cancer of the stomach.

(vii) Cancer of the small intestine.

(viii) Cancer of the pancreas.

(ix) Multiple myeloma.

(x) Lymphomas (except Hodgkin's disease).

(xi) Cancer of the bile ducts.

(xii) Cancer of the gall bladder.

(xiii) Primary liver cancer (except if cirrhosis or hepatitis B is indicated).

(xiv) Cancer of the salivary gland.

(xv) Cancer of the urinary tract.

(xvi) Bronchiolo-alveolar carcinoma.

Note: For the purposes of this section, the term "urinary tract" means the kidneys, renal pelves, ureters, urinary bladder, and urethra.

(xvii) Cancer of the bone.

(xviii) Cancer of the brain.

(xix) Cancer of the colon.

(xx) Cancer of the lung.

(xxi) Cancer of the ovary.

(Authority: 38 U.S.C. 1112(c)(2))

(3) For purposes of this section:

(i) The term radiation-exposed veteran means either a veteran who while serving on active duty, or an individual who while a member of a reserve component of the Armed Forces during a period of active duty for training or inactive duty training, participated in a radiation-risk activity.

(ii) The term radiation-risk activity means:

(A) Onsite participation in a test involving the atmospheric detonation of a nuclear device.

(B) The occupation of Hiroshima or Nagasaki, Japan, by United States forces during the period beginning on August 6, 1945, and ending on July

1, 1946.

(C) Internment as a prisoner of war in Japan (or service on active duty in Japan immediately following such internment) during World War II which resulted in an opportunity for exposure to ionizing radiation comparable to that of the United States occupation forces in Hiroshima or Nagasaki, Japan, during the period beginning on August 6, 1945, and ending on July 1, 1946.

(D)(1) Service in which the service member was, as part of his or her official military duties, present during a total of at least 250 days before February 1, 1992, on the grounds of a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or the area identified as K25 at Oak Ridge, Tennessee, if, during such service the veteran:

(i) Was monitored for each of the 250 days of such service through the use of dosimetry badges for exposure at the plant of the external parts of veteran's body to radiation; or

(ii) Served for each of the 250 days of such service in a position that had exposures comparable to a job that is or was monitored through the use of dosimetry badges; or

(2) Service before January 1, 1974, on Amchitka Island, Alaska, if, during such service, the veteran was exposed to ionizing radiation in the performance of duty related to the Long Shot, Milrow, or Cannikin underground nuclear tests.

(3) For purposes of paragraph (d)(3)(ii)(D)(1) of this section, the term "day" refers to all or any portion of a calendar day.

(E) Service in a capacity which, if performed as an employee of the Department of Energy, would qualify the individual for inclusion as a member of the Special Exposure Cohort under section 3621(14) of the Energy Employees Occupational Illness Compensation Program Act of 2000 (42 U.S.C. 7384l(14)).

(iii) The term atmospheric detonation includes underwater nuclear detonations.

(iv) The term onsite participation means:

(A) During the official operational period of an atmospheric nuclear test, presence at the test site, or performance of official military duties in connection with ships, aircraft or other equipment used in direct support of the nuclear test.

(B) During the six month period following the official operational period of an atmospheric nuclear test, presence at the test site or other test staging area to perform official military duties in connection with completion of projects related to the nuclear test including decontamination of equipment used during the nuclear test.

(C) Service as a member of the garrison or maintenance forces on Eniwetok during the periods June 21, 1951 through July 1, 1952, August 7, 1956 through August 7, 1957 or November 1, 1958 through April 30, 1959.

(D) Assignment to official military duties at Naval Shipyards involving the decontamination of ships that participated in Operation Crossroads.

(v) For tests conducted by the United States, the term operational period means:

(A) For Operation TRINITY the period July 16, 1945 through August 6, 1945.

(B) For Operation CROSSROADS the period July 1, 1946 through August 31, 1946.

(C) For Operation SANDSTONE the period April 15, 1948 through May 20, 1948.

(D) For Operation RANGER the period January 27, 1951 through February 6, 1951.

(E) For Operation GREENHOUSE the period April 8, 1951 through June 20, 1951.

(F) For Operation BUSTER-JANGLE the period October 22, 1951 through December 20, 1951.

(G) For Operation TUMBLER-SNAPPER the period April 1, 1952 through June 20, 1952.

(H) For Operation IVY the period November 1, 1952 through December 31, 1952.

(I) For Operation UPSHOT-KNOTHOLE the period March 17, 1953 through June 20, 1953.

(J) For Operation CASTLE the period March 1, 1954 through May 31, 1954.

(K) For Operation TEAPOT the period February 18, 1955 through June 10, 1955.

(L) For Operation WIGWAM the period May 14, 1955 through May 15, 1955.

(M) For Operation REDWING the period May 5, 1956 through August 6, 1956.

(N) For Operation PLUMBBOB the period May 28, 1957 through October 22, 1957.

(O) For Operation HARDTACK I the period April 28, 1958 through October 31, 1958.

(P) For Operation ARGUS the period August 27, 1958 through September 10, 1958.

(Q) For Operation HARDTACK II the period September 19, 1958 through October 31, 1958.

(R) For Operation DOMINIC I the period April 25, 1962 through December 31, 1962.

(S) For Operation DOMINIC II/PLOWSHARE the period July 6, 1962 through August 15, 1962.

(vi) The term "occupation of Hiroshima or Nagasaki, Japan, by United States forces" means official military duties within 10 miles of the city limits of either Hiroshima or Nagasaki, Japan, which were required to perform or support military occupation functions such as occupation of territory, control of the population, stabilization of the government, demilitarization of the Japanese military, rehabilitation of the infrastructure or deactivation and conversion of war plants or materials.

(vii) Former prisoners of war who had an opportunity for exposure to ionizing radiation comparable to that of veterans who participated in the occupation of Hiroshima or Nagasaki, Japan, by United States forces shall include those who, at any time during the period August 6, 1945, through July 1, 1946:

(A) Were interned within 75 miles of the city limits of Hiroshima or within 150 miles of the city limits of Nagasaki, or

(B) Can affirmatively show they worked within the areas set forth in paragraph (d)(3)(vii)(A) of this section although not interned within those areas, or

(C) Served immediately following internment in a capacity which satisfies the definition in paragraph (d)(3)(vi) of this section, or

(D) Were repatriated through the port of Nagasaki.

(Authority: 38 U.S.C. 1110, 1112, 1131)

(e) Disease associated with exposure to certain herbicide agents. If a veteran was exposed to an herbicide agent during active military, naval, or air service, the following diseases shall be service-connected if the requirements of § 3.307(a)(6) are met even though there is no record of such disease during service, provided further that the rebuttable presumption provisions of § 3.307(d) are also satisfied.

Chloracne or other acneform disease consistent with chloracne

Type 2 diabetes (also known as Type II diabetes mellitus or adult-onset diabetes)

Hodgkin's disease

Chronic lymphocytic leukemia

Multiple myeloma

Non-Hodgkin's lymphoma

Acute and subacute peripheral neuropathy

Porphyria cutanea tarda

Prostate cancer

Respiratory cancers (cancer of the lung, bronchus, larynx, or trachea)

Soft-tissue sarcoma (other than osteosarcoma, chondrosarcoma, Kaposi's sarcoma, or mesothelioma)

Note 1: The term "soft-tissue sarcoma" includes the following:

Adult fibrosarcoma

Dermatofibrosarcoma protuberans

Malignant fibrous histiocytoma

Liposarcoma

Leiomyosarcoma

Epithelioid leiomyosarcoma (malignant leiomyoblastoma)

Rhabdomyosarcoma

Ectomesenchymoma

Angiosarcoma (hemangiosarcoma and lymphangiosarcoma)

Proliferating (systemic) angioendotheliomatosis

Malignant glomus tumor

Malignant hemangiopericytoma

Synovial sarcoma (malignant synovioma)

Malignant giant cell tumor of tendon sheath

Malignant schwannoma, including malignant schwannoma with rhabdomyoblastic differentiation (malignant Triton tumor), glandular and epithelioid malignant schwannomas

Malignant mesenchymoma

Malignant granular cell tumor

Alveolar soft part sarcoma

Epithelioid sarcoma

Clear cell sarcoma of tendons and aponeuroses

Extraskeletal Ewing's sarcoma

Congenital and infantile fibrosarcoma

Malignant ganglioneuroma

Note 2: For purposes of this section, the term acute and subacute peripheral neuropathy means transient peripheral neuropathy that appears within weeks or months of exposure to an herbicide agent and resolves within two years of the date of onset.

(Authority: 38 U.S.C. 501(a) and 1116)

[26 FR 1582, Feb. 24, 1961, as amended at 31 FR 4680, March 19, 1966; 35 FR 18281, Dec. 1, 1970; 39 FR 34530, Sept. 26, 1974; 41 FR 55873, Dec. 23, 1976; 47 FR 11656, March 18, 1982; 47 FR 54436, Dec. 3, 1982; 49 FR 47003, Nov. 30, 1984; 53 FR 23236, June 21, 1988; 54 FR 26029, June 21, 1989; 57 FR 10426, March 26, 1992; 58 FR 25564, April 27, 1993; 58 FR 29109, May 19, 1993; 58 FR 41636, Aug. 5, 1993; 59 FR 5107, Feb. 3, 1994; 59 FR 25329, May 16, 1994; 59 FR 29724, June 9, 1994; 59 FR 35465, July 12, 1994; 60 FR 31252, June 14, 1995; 61 FR 57589, Nov. 7, 1996; 65 FR 43700, July 14, 2000; 66 FR 23168, May 8, 2001; 67 FR 3615, Jan. 25, 2002; 67 FR 67793, Nov. 7, 2002; 68 FR 42603, July 18, 2003; 68 FR 59542, Oct. 16, 2003; 69 FR 31882, June 8, 2004; 69 FR 60089, Oct. 7, 2004; 70 FR 37042, June 28, 2005; 71 FR 44918, Aug. 8, 2006; 73 FR 30485, May 28, 2008; 73 FR 31753, June 4, 2008]

SOURCE: 56 FR 65846, 65847, 65849, 65851, 65853, Dec. 19, 1991; 57 FR 8268, March 9, 1992; 57 FR 10425, March 26, 1992; 57 FR 59296, Dec. 15, 1992, unless otherwise noted.; 54 FR 34978, 34981, Aug. 23, 1989; 57 FR 31007, 31012, July 13, 1992; 57 FR 38610, Aug. 26, 1992, unless otherwise noted.

AUTHORITY: 38 U.S.C. 501(a)

APPENDIX K

CODE OF FEDERAL REGULATIONS

Title 38.—Pensions, Bonuses, and Veterans' Relief

Chapter I.—Department of Veterans Affairs

Part 3.—Adjudication

Subpart A.—Pension, Compensation, and Dependency and Indemnity Compensation Ratings and Evaluations; Service Connection

---

§ 3.311 Claims based on exposure to ionizing radiation.

(a) Determinations of exposure and dose—

(1) Dose assessment. In all claims in which it is established that a radiogenic disease first became manifest after service and was not manifest to a compensable degree within any applicable presumptive period as specified in § 3.307 or § 3.309, and it is contended the disease is a result of exposure to ionizing radiation in service, an assessment will be made as to the size and nature of the radiation dose or doses. When dose estimates provided pursuant to paragraph (a)(2) of this section are reported as a range of doses to which a veteran may have been exposed, exposure at the highest level of the dose range reported will be presumed.

(Authority: 38 U.S.C. 501)

(2) Request for dose information. Where necessary pursuant to paragraph (a)(1) of this section, dose information will be requested as follows:

(i) Atmospheric nuclear weapons test partici-

pation claims. In claims based upon participation in atmospheric nuclear testing, dose data will in all cases be requested from the appropriate office of the Department of Defense.

(ii) Hiroshima and Nagasaki occupation claims. In all claims based on participation in the American occupation of Hiroshima or Nagasaki, Japan, prior to July 1, 1946, dose data will be requested from the Department of Defense.

(iii) Other exposure claims. In all other claims involving radiation exposure, a request will be made for any available records concerning the veteran's exposure to radiation. These records normally include but may not be limited to the veteran's Record of Occupational Exposure to Ionizing Radiation (DD Form 1141), if maintained, service medical records, and other records which may contain information pertaining to the veteran's radiation dose in service. All such records will be forwarded to the Under Secretary for Health, who will be responsible for preparation of a dose estimate, to the extent feasible, based on available methodologies.

(3) Referral to independent expert. When necessary to reconcile a material difference between an estimate of dose, from a credible source, submitted by or on behalf of a claimant, and dose data derived from official military records, the estimates and supporting documentation shall be referred to an independent expert, selected by the Director of the National Institutes of Health, who shall prepare a separate radiation dose

estimate for consideration in adjudication of the claim. For purposes of this paragraph:

(i) The difference between the claimant's estimate and dose data derived from official military records shall ordinarily be considered material if one estimate is at least double the other estimate.

(ii) A dose estimate shall be considered from a "credible source" if prepared by a person or persons certified by an appropriate professional body in the field of health physics, nuclear medicine or radiology and if based on analysis of the facts and circumstances of the particular claim.

(4) Exposure. In cases described in paragraph (a)(2) (i) and (ii) of this section:

(i) If military records do not establish presence at or absence from a site at which exposure to radiation is claimed to have occurred, the veteran's presence at the site will be conceded.

(ii) Neither the veteran nor the veteran's survivors may be required to produce evidence substantiating exposure if the information in the veteran's service records or other records maintained by the Department of Defense is consistent with the claim that the veteran was present where and when the claimed exposure occurred.

(b) Initial review of claims.

(1) When it is determined:

(i) A veteran was exposed to ionizing radiation as a result of participation in the atmospheric testing of nuclear weapons, the occupation of

Hiroshima or Nagasaki, Japan, from September 1945 until July 1946, or other activities as claimed;

(ii) The veteran subsequently developed a radiogenic disease; and

(iii) Such disease first became manifest within the period specified in paragraph (b)(5) of this section; before its adjudication the claim will be referred to the Under Secretary for Benefits for further consideration in accordance with paragraph (c) of this section. If any of the foregoing 3 requirements has not been met, it shall not be determined that a disease has resulted from exposure to ionizing radiation under such circumstances.

(2) For purposes of this section the term "radiogenic disease" means a disease that may be induced by ionizing radiation and shall include the following:

(i) All forms of leukemia except chronic lymphatic (lymphocytic) leukemia;

(ii) Thyroid cancer;

(iii) Breast cancer;

(iv) Lung cancer;

(v) Bone cancer;

(vi) Liver cancer;

(vii) Skin cancer;

(viii) Esophageal cancer;

(ix) Stomach cancer;

(x) Colon cancer;

(xi) Pancreatic cancer;

(xii) Kidney cancer;

(xiii) Urinary bladder cancer;

(xiv) Salivary gland cancer;

(xv) Multiple myeloma;

(xvi) Posterior subcapsular cataracts;

(xvii) Non-malignant thyroid nodular disease;

(xviii) Ovarian cancer;

(xix) Parathyroid adenoma;

(xx) Tumors of the brain and central nervous system;

(xxi) Cancer of the rectum;

(xxii) Lymphomas other than Hodgkin's disease;

(xxiii) Prostate cancer; and

(xxiv) Any other cancer.

(Authority: 38 U.S.C. 501)

(3) Public Law 98-542 requires VA to determine whether sound medical and scientific evidence supports establishing a rule identifying polycythemia vera as a radiogenic disease. VA has determined that sound medical and scientific evidence does not support including polycythemia vera on the list of known radiogenic diseases in this regulation. Even so, VA will

consider a claim based on the assertion that polycythemia vera is a radiogenic disease under the provisions of paragraph (b)(4) of this section.

(4) If a claim is based on a disease other than one of those listed in paragraph (b)(2) of this section, VA shall nevertheless consider the claim under the provisions of this section provided that the claimant has cited or submitted competent scientific or medical evidence that the claimed condition is a radiogenic disease.

(5) For the purposes of paragraph (b)(1) of this section:

(i) Bone cancer must become manifest within 30 years after exposure;

(ii) Leukemia may become manifest at any time after exposure;

(iii) Posterior subcapsular cataracts must become manifest 6 months or more after exposure; and

(iv) Other diseases specified in paragraph (b)(2) of this section must become manifest 5 years or more after exposure.

(Authority: 38 U.S.C. 501(c); Pub.L. 98-542)

(c) Review by Under Secretary for Benefits.

(1) When a claim is forwarded for review pursuant to paragraph (b)(1) of this section, the Under Secretary for Benefits shall consider the claim with reference to the factors specified in paragraph (e) of this section and may request an advisory medical opinion from the Under Secretary for Health.

(i) If after such consideration the Under Secretary for Benefits is convinced sound scientific and medical evidence supports the conclusion it is at least as likely as not the veteran's disease resulted from exposure to radiation in service, the Under Secretary for Benefits shall so inform the regional office of jurisdiction in writing. The Under Secretary for Benefits shall set forth the rationale for this conclusion, including an evaluation of the claim under the applicable factors specified in paragraph (e) of this section.

(ii) If the Under Secretary for Benefits determines there is no reasonable possibility that the veteran's disease resulted from radiation exposure in service, the Under Secretary for Benefits shall so inform the regional office of jurisdiction in writing, setting forth the rationale for this conclusion.

(2) If the Under Secretary for Benefits, after considering any opinion of the Under Secretary for Health, is unable to conclude whether it is at least as likely as not, or that there is no reasonable possibility, the veteran's disease resulted from radiation exposure in service, the Under Secretary for Benefits shall refer the matter to an outside consultant in accordance with paragraph (d) of this section.

(3) For purposes of paragraph (c)(1) of this section, "sound scientific evidence" means observations, findings, or conclusions which are statistically and epidemiologically valid, are statistically significant, are capable of replication, and withstand peer review, and "sound medical evidence" means observations, findings, or con-

clusions which are consistent with current medical knowledge and are so reasonable and logical as to serve as the basis of management of a medical condition.

(d) Referral to outside consultants.

(1) Referrals pursuant to paragraph (c) of this section shall be to consultants selected by the Under Secretary for Health from outside VA, upon the recommendation of the Director of the National Cancer Institute. The consultant will be asked to evaluate the claim and provide an opinion as to the likelihood the disease is a result of exposure as claimed.

(2) The request for opinion shall be in writing and shall include a description of:

(i) The disease, including the specific cell type and stage, if known, and when the disease first became manifest;

(ii) The circumstances, including date, of the veteran's exposure;

(iii) The veteran's age, gender, and pertinent family history;

(iv) The veteran's history of exposure to known carcinogens, occupationally or otherwise;

(v) Evidence of any other effects radiation exposure may have had on the veteran; and

(vi) Any other information relevant to determination of causation of the veteran's disease.

The Under Secretary for Benefits shall forward, with the request, copies of pertinent medical records and, where available, dose assessments from official sources, from credible sources

as defined in paragraph (a)(3)(ii) of this section, and from an independent expert pursuant to paragraph (a)(3) of this section.

(3) The consultant shall evaluate the claim under the factors specified in paragraph (e) of this section and respond in writing, stating whether it is either likely, unlikely, or approximately as likely as not the veteran's disease resulted from exposure to ionizing radiation in service. The response shall set forth the rationale for the consultant's conclusion, including the consultant's evaluation under the applicable factors specified in paragraph (e) of this section. The Under Secretary for Benefits shall review the consultant's response and transmit it with any comments to the regional office of jurisdiction for use in adjudication of the claim.

(e) Factors for consideration. Factors to be considered in determining whether a veteran's disease resulted from exposure to ionizing radiation in service include:

(1) The probable dose, in terms of dose type, rate and duration as a factor in inducing the disease, taking into account any known limitations in the dosimetry devices employed in its measurement or the methodologies employed in its estimation;

(2) The relative sensitivity of the involved tissue to induction, by ionizing radiation, of the specific pathology;

(3) The veteran's gender and pertinent family history;

(4) The veteran's age at time of exposure;

(5) The time-lapse between exposure and onset of

the disease; and

(6) The extent to which exposure to radiation, or other carcinogens, outside of service may have contributed to development of the disease.

(f) Adjudication of claim. The determination of service connection will be made under the generally applicable provisions of this part, giving due consideration to all evidence of record, including any opinion provided by the Under Secretary for Health or an outside consultant, and to the evaluations published pursuant to § 1.17 of this title. With regard to any issue material to consideration of a claim, the provisions of § 3.102 of this title apply.

(g) Willful misconduct and supervening cause. In no case will service connection be established if the disease is due to the veteran's own willful misconduct, or if there is affirmative evidence to establish that a supervening, nonservice-related condition or event is more likely the cause of the disease.

(Authority: Pub.L. 98-542)

[50 FR 34459, Aug. 26, 1985; 54 FR 34981, Aug. 23, 1989; 54 FR 42803, Oct. 18, 1989; 58 FR 16359, March 26, 1993; 59 FR 5107, Feb. 3, 1994; 59 FR 45975, Sept. 6, 1994; 60 FR 9628, Feb. 21, 1995; 60 FR 53277, Oct. 13, 1995; 63 FR 50994, Sept. 24, 1998; 67 FR 6871, Feb. 14, 2002]

SOURCE: 56 FR 65846, 65847, 65849, 65851, 65853, Dec. 19, 1991; 57 FR 8268, March 9, 1992; 57 FR 10425, March 26, 1992; 57 FR 59296, Dec. 15, 1992, unless otherwise noted.; 54 FR 34978, 34981, Aug. 23, 1989; 57 FR 31007, 31012, July 13, 1992; 57 FR 38610, Aug. 26, 1992, unless otherwise noted.

AUTHORITY: 38 U.S.C. 501(a)

APPENDIX L

CODE OF FEDERAL REGULATIONS

Title 38.—Pensions, Bonuses, and Veterans' Relief

Chapter I.—Department of Veterans Affairs

Part 3.—Adjudication

Subpart A.—Pension, Compensation, and Dependency and Indemnity Compensation Ratings and Evaluations; Service Connection

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§ 3.313 Claims based on service in Vietnam.

(a) Service in Vietnam. Service in Vietnam includes service in the waters offshore, or service in other locations if the conditions of service involved duty or visitation in Vietnam.

(b) Service connection based on service in Vietnam. Service in Vietnam during the Vietnam Era together with the development of non-Hodgkin's lymphoma manifested subsequent to such service is sufficient to establish service connection for that disease.

(Authority: 38 U.S.C. 501)

[55 FR 43124, Oct. 26, 1990]

SOURCE: 56 FR 65846, 65847, 65849, 65851, 65853, Dec. 19, 1991; 57 FR 8268, March 9, 1992; 57 FR 10425, March 26, 1992; 57 FR 59296, Dec. 15, 1992, unless otherwise noted.; 54 FR 34978, 34981, Aug. 23, 1989; 57 FR 31007, 31012, July 13, 1992; 57 FR 38610, Aug. 26, 1992, unless otherwise noted; 54 FR 34978, 34981, Aug. 23, 1989; 57 FR 31007, 31012, July 13, 1992; 57 FR 38610, Aug. 26, 1992, unless otherwise noted.

AUTHORITY: 38 U.S.C. 501(a).

(4)

Supreme Court, U.S.
FILED
DEC 19 2008
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No. 08-525

In the Supreme Court of the United States

JONATHAN L. HAAS, PETITIONER

v.

JAMES B. PEAKE, SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

In general, a veteran who seeks disability benefits must establish that his disability resulted from his military service. Under the Agent Orange Act of 1991, Pub. L. No. 102-4, § 2, 103 Stat. 11-12 (now codified at 38 U.S.C. 1116(a)), when veterans who "served in the Republic of Vietnam" between 1962 and 1975 develop certain diseases that have been linked to herbicide exposure, those diseases are presumed to be service connected. The question presented is as follows:

Whether the court of appeals correctly deferred to the Department of Veterans Affairs' interpretation of the term "serv[ice] in the Republic of Vietnam," which excludes veterans who served on ships off the coast of Vietnam but never set foot on the land mass of Vietnam.

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In the Supreme Court of the United States

No. 08-525

JONATHAN L. HAAS, PETITIONER

v.

JAMES B. PEAKE, SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-62a) is reported at 525 F.3d 1169. The supplemental opinion of the court of appeals on denial of rehearing (Pet. App. 63a-70a) is reported at 544 F.3d 1306. The opinion of the Court of Appeals for Veterans Claims (Pet. App. 71a-113a) is reported at 20 Vet. App. 257. The decision of the Board of Veterans' Appeals (Pet. App. 114a-126a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 2008. A petition for rehearing was denied on October 9, 2008 (Pet. App. 136a-137a). The petition for a writ of certiorari was filed on October 17, 2008. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In the Agent Orange Act of 1991, Pub. L. No. 102-4, 103 Stat. 11, Congress established a framework for compensating veterans for illnesses that may have been caused by Agent Orange, a herbicide used for defoliation during the Vietnam War. Pet. App. 2a. In order to receive compensation for an illness related to military service, a veteran generally must establish that the disability is service connected, meaning that it was "incurred or aggravated * * * in [the] line of duty in the active military, naval, or air service." 38 U.S.C. 101(16). Determining service connectedness had long proven difficult with respect to diseases that may have been caused by Agent Orange, both because of the uncertain effects of Agent Orange on human health and because it is not possible to determine precisely who was exposed to Agent Orange in Vietnam. See, *e.g.*, S. Rep. No. 439, 100th Cong., 2d Sess. 65 (1988); 50 Fed. Reg. 34,454-34,455 (1995); see also Pet. App. 2a, 11a-15a.

The Agent Orange Act establishes a presumption of service connectedness for certain veterans who developed certain diseases that may have been caused by exposure to Agent Orange. The listed diseases include non-Hodgkin's lymphoma, certain soft-tissue sarcomas, chloracne, Hodgkin's disease, porphyria cutanea tarda, certain respiratory cancers, multiple myeloma, and (as relevant here) diabetes mellitus (type 2 diabetes). 38 U.S.C. 1116(a)(2). If a veteran who "served in the Republic of Vietnam" between January 9, 1962, and May 7, 1975, develops one of those diseases, the disease ordinarily "will be considered to have been incurred or aggravated by such service." 38 U.S.C 1116(a)(1)(A). If

a veteran does not qualify for the presumption of service connectedness, he may demonstrate his entitlement to benefits by proving that he actually was exposed to Agent Orange and that Agent Orange caused his disability. See Pet. App. 56a; see also 38 U.S.C. 101(16).

b. The Secretary of the Department of Veterans Affairs (Secretary) has promulgated regulations to implement the Agent Orange Act. As relevant here, the Secretary has defined the term "served in the Republic of Vietnam" to include "service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam." 38 C.F.R. 3.307(a)(6)(iii). The Secretary has long interpreted that regulation to require that a veteran who served on a ship offshore must have set foot on the land mass of Vietnam to have "served in the Republic of Vietnam." See 66 Fed. Reg. 23,166 (2001); 62 Fed. Reg. 51,274-51,275 (1997); Op. Gen. Counsel Dep't Vet. Aff. Precedent No. 27-97 (July 23, 1997); Op. Gen. Counsel Dep't Vet. Aff. Precedent No. 7-93 (Aug. 12, 1993). The Secretary has explained that requirement as follows:

> Because herbicides were not applied in waters off the shore of Vietnam, limiting the scope of the term service in the Republic of Vietnam to persons whose service involved duty or visitation in the Republic of Vietnam limits the focus of the presumption of exposure to persons who may have been in areas where herbicides could have been encountered.

62 Fed. Reg. at 51,274.

In 2004, as part of a comprehensive overhaul of Department of Veterans Affairs (VA) regulations, the Secretary published a proposed rule that confirms that a person who served on a ship off the coast of Vietnam

but never set foot on the Vietnamese land mass had not "served in the Republic of Vietnam" for purposes of the statutory presumption. 69 Fed. Reg. 44,614-44,615 (2004). The Secretary explained that he was "not aware of any valid scientific evidence showing that individuals who served in the waters offshore of the Republic of Vietnam * * * were subject to the same risk of herbicide exposure as those who served within the geographic land boundaries of the Republic of Vietnam." *Id.* at 44,620. The Secretary therefore proposed amending the regulation to "make it clear that veterans who served in waters offshore but did not enter Vietnam, either on its land mass or in its inland waterways[,] cannot benefit from this presumption." *Ibid.* The revised regulation would read: "For purposes of this section, 'Service in the Republic of Vietnam' does not include service in the waters offshore or service in other locations, but does include any service in which the veteran had duty in or visited in the Republic of Vietnam." *Ibid.* (proposing to amend 38 C.F.R. 3.307(a)(6)(iii) and renumber it 38 C.F.R. 5.262).

Earlier this year, the Secretary initiated a rulemaking proceeding to make explicit the requirement that a veteran must have set foot on the land mass of Vietnam to benefit from the statutory presumption. The amended regulation would define "service in the Republic of Vietnam" to include "service on land, or on an inland waterway, in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975." 73 Fed. Reg. 20,571 (2008). The Secretary explained that the statute's requirement of "serv[ice] in the Republic of Vietnam" "is most reasonably interpreted to refer to service within the land borders of the Republic of Vietnam," because "herbicides were commonly

deployed in foliated land areas and would have been released seldom, if at all, over the open waters off the coast of Vietnam." *Id.* at 20,568. The Secretary further observed that "the purpose of the presumption of exposure [is] to provide a remedy for persons who may have been exposed to herbicides because they were stationed in areas where herbicides were used." *Id.* at 20,568-20,569. Both the 2004 and 2008 rulemaking proposals are still pending.

2. Petitioner is a veteran of the Vietnam War. From August 1967 to April 1969, he served in the United States Navy aboard the U.S.S. *Mount Katmai*, an ammunition supply ship that operated in the Pacific Ocean off the coast of Vietnam. It is undisputed that petitioner's ship never moored in a Vietnamese port and that he never set foot on shore. Pet. App. 5a.

In August 2001, petitioner applied to the VA for disability compensation for type 2 diabetes, peripheral neuropathy, and loss of eyesight. Pet. App. 4a. Although petitioner has a family history of diabetes, he contended that his conditions were caused by exposure to the herbicides contained in Agent Orange during his military service. *Id.* at 4a, 74a. He argued that he is entitled to a presumption of service connectedness based upon his service "in the Republic of Vietnam." 38 U.S.C. 1116(a)(1)(A); 38 C.F.R. 3.307(a)(6)(iii); see Pet. App. 5a.[1]

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[1] In the alternative, petitioner contended that he actually was exposed to herbicides that were sprayed over land but drifted out over the ocean. That claim is not before this Court. See Pet. App. 56a. To the extent that petitioner now contends that he has evidence to establish actual exposure, he may bring that evidence to the attention of the VA. See *id.* at 133a-134a; pp. 18-19 & note 4, *infra*.

A regional office of the VA denied petitioner's claim. Pet. App. 127a-135a. Citing the statute and the VA's regulations, the regional office concluded that petitioner had not served "in the Republic of Vietnam" for purposes of the statutory presumption of service connectedness because he had served "in the waters offshore" and had never set foot on Vietnamese land. *Id.* at 130a-131a. The regional office explained that, "since application of herbicides would not have occurred in waters off the shore of Vietnam," the VA's interpretation reasonably "focus[es] the coverage of the regulations on persons who may have been in areas where herbicides could have been encountered." *Id.* at 132a.

3. The Board of Veterans' Appeals affirmed the denial of petitioner's claim. Pet. App. 114a-126a. It concluded that, under the agency's consistent interpretation of its own regulations, service on a naval vessel off the shore of Vietnam does not constitute "service in the Republic of Vietnam" for purposes of the statutory presumption. *Id.* at 119a-121a. It explained that the VA's understanding of the presumption's scope reflected the fact that "[herbicide] agents, which destroyed vegetation, were not used at sea." *Id.* at 120a.

4. The Court of Appeals for Veterans Claims reversed. Pet. App. 71a-113a. It agreed with the Secretary that the term "served in the Republic of Vietnam," as it appears in 38 U.S.C. 1116(a)(1)(A), could reasonably be construed either to encompass or to exclude service in waters off the Vietnamese coast. Pet. App. 80a-84a. The court then determined that the VA's regulatory definition of the term "service in the Republic of Vietnam," 38 C.F.R. 3.307(a)(6)(iii), is similarly "ambiguous regarding whether service on the land in Vietnam

is required for the presumption to apply." Pet. App. 92a.

Although the court recognized that the VA's interpretation of its own regulation is entitled to "controlling weight unless it is plainly erroneous or inconsistent with the regulation," Pet. App. 94a (internal quotation marks omitted), it refused to defer to the VA's interpretation of the agency rule, *id.* at 95a-105a. The court stated that the VA's current interpretation of the regulation is inconsistent with prior agency views. *Id.* at 95a-98a. The court also found that interpretation to be unreasonable because, in the court's view, "veterans serving on vessels in close proximity to land would have the same risk of exposure to the herbicide Agent Orange as veterans serving on adjacent land." *Id.* at 100a.[2]

5. The court of appeals reversed. Pet. App. 1a-62a. As an initial matter, it rejected petitioner's argument that the term "served in the Republic of Vietnam" unambiguously includes service in the Pacific Ocean off the coast of Vietnam. *Id.* at 27a-32a. Rather, after analyzing the statutory and regulatory history, *id.* at 10a-27a, the court of appeals determined that the statute is ambiguous in that regard, *id.* at 27a-32a. The court observed that a nation's boundaries may be defined in a variety of different ways, some of which include offshore waters and others of which do not. *Id.* at 28a. The court found that "[n]either the language of the statute nor its legislative history indicates that Congress intended to

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[2] The court also determined that the VA's modification of an internal guidance manual to reflect its regulation was invalid because it was not preceded by notice-and-comment rulemaking, and that the revised manual could not be retroactively applied to petitioner. Pet. App. 105a-111a. The court of appeals rejected those claims, *id.* at 51a-55a, and they are not before this Court.

designate one of the competing methods of defining the reaches of a sovereign nation." *Id.* at 29a.

The court of appeals next determined that the regulation—which speaks of "duty or visitation in the Republic of Vietnam," 38 C.F.R. 3.307(a)(6)(iii)—is also ambiguous, although the court stated that the government's reading is "probably the most natural reading of the language." Pet. App. 32a-33a. Under those circumstances, the court observed, the "agency's interpretation of its own regulations is controlling unless plainly erroneous or inconsistent with the regulations being interpreted." *Id.* at 33a (quoting *Long Island Care at Home, Ltd.* v. *Coke*, 127 S. Ct. 2339, 2346 (2007)).

Applying that deferential standard of review, the court upheld the Secretary's interpretation of the VA rule. The court observed that "the agency's position has been consistent for more than a decade, and there is 'no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter.'" Pet. App. 41a (quoting *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997)). The court further explained that, because "Agent Orange was sprayed only on land," *id.* at 46a, "it was not arbitrary for the agency to limit the presumptions of exposure and service connection to servicemembers who had served, for some period at least, on land," *id.* at 48a. See *ibid.* ("Drawing a line between service on land, where herbicides were used, and service at sea, where they were not, is prima facie reasonable.").

Judge Fogel dissented. Pet. App. 56a-62a. He would have held that the VA's interpretation of its own regulation was "inconsistent with the intent of the statute," *id.* at 56a, and was not based on a sufficiently "careful scientific assessment" of the risks posed by Agent Orange, *id.* at 61a.

6. The court of appeals denied petitioner's petition for rehearing. Pet. App. 136a-137a. In a supplemental opinion issued on denial of rehearing, *id.* at 63a-70a, the court again rejected petitioner's argument that the statutory text was plain, citing various other "statutory references to presence 'in' a country" that "have been understood not to include presence in the airspace or the territorial waters." *Id.* at 69a-70a.

The court of appeals also rejected petitioner's argument, raised for the first time in his petition for rehearing, that the Secretary's reasonable interpretation of the statute must yield to the canon that statutory ambiguities should be resolved in favor of veterans. Pet. App. 67a-69a. The court explained that the canon does not require it to disregard the agency's otherwise reasonable construction of the statute. *Id.* at 67a-68a. In any event, the court noted, "this case would present a practical difficulty in determining what it means for an interpretation to be 'pro-claimant,'" because the Secretary "has already interpreted the statute in a pro-claimant manner by applying it to any veteran who set foot on land, even if for only a very short period of time." *Id.* at 68a. Under those circumstances, the court concluded, it is "by no means clear that [the canon's] application would have required that the statute cover [petitioner's] case." *Id.* at 68a-69a.

ARGUMENT

In deferring to the VA's reasonable construction of its own regulation and of the statutory presumption at issue in this case, the court of appeals correctly applied basic principles of statutory construction and administrative law. The decision of the court of appeals does not conflict with any decision of this Court or any other

court of appeals. Further review is therefore unwarranted.

1. Petitioner contends (Pet. 18-22) that, under the unambiguous terms of the relevant statutory text, he is entitled to the presumption of service connectedness based on his service on a ship stationed in the ocean off the coast of Vietnam, even though the ship never moored in a Vietnamese port and petitioner never set foot on shore. That argument lacks merit.

Congress did not directly address the question whether a veteran who served on a naval vessel in the Pacific Ocean near Vietnam is entitled to the statutory presumption of service connectedness. The Agent Orange Act provides that veterans who "served in the Republic of Vietnam" and who later develop specified diseases are entitled to a presumption that their diseases are service connected. 38 U.S.C. 1116(a)(1)(A). Although Congress defined a number of other terms in the Act—including "veteran," "service connected," "active military, naval, or air service," and "Vietnam era," 38 U.S.C. 101(2), (16), (24) and (29)—it did not define the term "served in the Republic of Vietnam."

Both of the courts below agreed that the statute is ambiguous with respect to the question presented here. Pet. App. 27a-32a, 69a-70a (court of appeals); *id.* at 80a-92a (Court of Appeals for Veterans Claims). As the court of appeals explained (*id.* at 28a-29a), the identification of a nation's outer boundary depends on the issue presented for resolution. The territory under a nation's jurisdiction may include the nation's land mass, airspace, internal waters, territorial sea, archipelagic waters, contiguous zone, continental shelf, and exclusive economic zone. See, *e.g.*, 1 E.D. Brown, *Sea-Bed Energy*

and Mineral Resources and the Law of the Sea: The Areas Within National Jurisdiction I.1 3 (1984).

At least one statute that identifies Vietnam veterans for purposes of awarding them expanded rehabilitation and educational benefits refers separately to the country's land mass, its airspace, and its waters. See Act of Oct. 17, 1980, Pub. L. No. 96-466, § 513(b), 94 Stat. 2208 (38 U.S.C. 4107 note) (stating that "veterans who served * * * in Vietnam, in air missions over Vietnam, or in naval missions in the waters adjacent to Vietnam shall be considered to be veterans who served in the Vietnam theatre of operations"). Those references suggest that terms such as "Vietnam" and "the Republic of Vietnam" do not unambiguously encompass waters adjacent to the Vietnamese land mass. A prior statute applicable to veterans who served during the Mexican Border War similarly referred to veterans who "served in Mexico, on the borders thereof, or in the waters adjacent thereto." 38 U.S.C. 101(30). Under that law, the term "served in Mexico" clearly did not encompass service on ships stationed off the Mexican coast, since service on such vessels was separately provided for.

In various other contexts, Congress has adopted different definitions of a nation's boundaries. For example, geographical distinctions between United States territory and United States territorial waters have historically been prevalent in immigration policy. See, *e.g.*, *Taylor* v. *United States*, 207 U.S. 120, 125 (1907) (to "land" in the United States, immigrants must depart from their vessels and come ashore onto United States soil); 8 U.S.C. 1158(a)(1) (stating that "[a]ny alien who is physically present in the United States or who arrives in the United States * * * may apply for asylum"); 8 U.S.C. 1101(a)(38) (defining "United States" to include

"the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States"); *Immigration Consequences of Undocumented Aliens' Arrival in United States Territorial Waters*, 17 Op. Off. Legal Counsel 77, 85 (1993) (concluding that the "United States" does not include aliens interdicted in territorial waters). And, as the court of appeals noted, "[i]n at least one instance, the term 'United States' is defined differently in different sections within the same title, in one case expressly including the territorial waters and in another not." Pet. App. 69a (citing 26 U.S.C. 638, 7701(a)(9)); see 49 U.S.C. 40102(a)(46) (defining "United States" to include "the territorial sea and the overlying airspace"). Those examples confirm that Congress's unadorned reference to "the Republic of Vietnam" does not unambiguously encompass or exclude waters near the Vietnamese coast.

Petitioner contends (Pet. 19-21) that Congress's reference to the "Republic of Vietnam" necessarily includes its territorial waters because all accepted definitions of a sovereign nation include that nation's territorial waters. That is incorrect. There are a number of definitions, discussed in detail by the courts below, that define a nation's boundaries without respect to its territorial waters. Pet. App. 28a-29a, 69a-70a, 80a-82a. There is no suggestion, either in the statutory text or the legislative history, that Congress intended to incorporate international law principles relating to the territorial sea in determining which veterans were entitled to the presumption of service connectedness.

Petitioner also observes (Pet. 23-24) that other parts of 38 U.S.C. 1116 refer to "active military, naval or air service in the Republic of Vietnam." Those references, however, simply make clear that veterans who served

"in the Republic of Vietnam" are entitled to the statutory presumption regardless of which branch of the Armed Forces they were part of. Under the Secretary's regulatory definition of "service in the Republic of Vietnam," which encompasses even very brief periods of duty on the Vietnamese land mass, the presumption of service connectedness would be available to numerous Navy and Air Force veterans. The statute's reference to naval and air service therefore does not shed light on the choice between the competing interpretations of the term "served in the Republic of Vietnam."

Petitioner also contends (Pet. 25-27) that Congress, in enacting 38 U.S.C. 1116(a), intended to adopt a preexisting regulation under which veterans in his position would have been entitled to a presumption of service connectedness. That is incorrect. To the extent the regulatory history preceding the Agent Orange Act is instructive, it supports the Secretary's interpretation. See Pet. App. 30a-32a.

Before the Agent Orange Act was enacted, the Secretary had adopted two different regulations that listed different statutory presumptions for chloracne (38 C.F.R. 3.311a (1986)) and for non-Hodgkins lymphoma (38 C.F.R. 3.313). Section 3.311a resulted from the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725, which directed the Secretary to establish standards for resolving whether certain diseases, such as chloracne, should be treated as service connected based upon likely herbicide exposure. By contrast, the Section 3.313 presumption, which extends to sailors regardless of whether they set foot in Vietnam, "was not predicated on exposure, but instead was based on evidence of an association between non-Hodgkin's lymphoma and service in the Viet-

nam theater, including service aboard ships." Pet. App. 31a-32a; see 55 Fed. Reg. 43,124 (1990).

As the court of appeals explained, Sections 3.311a and 3.313 did not use identical language in defining the classes of Vietnam-era veterans to whom the regulations would apply. See Pet. App. 11a-12a, 16a-17a. A close reading of the two regulations suggests that veterans who served exclusively in Vietnamese territorial waters would not be covered by the former regulation but would be covered by the latter. See *id.* at 16a-17a. In enacting the Agent Orange Act, Congress borrowed the phrase "service in the Republic of Vietnam" from Section 3.311a, *id.* at 32a, and the current regulation now utilizes Section 3.311a's "duty or visitation" language, 38 C.F.R. 3.307(a)(6)(iii). There is consequently no reason to believe that Congress intended to adopt the formulation in Section 3.313, which did not concern herbicide exposure, as opposed to the different language in Section 3.311a, which did.

2. Petitioner renews his argument (Pet. 28-30), made for the first time in his petition for rehearing in the Federal Circuit, that the court of appeals should have applied the pro-veteran canon of statutory construction to resolve any statutory ambiguity in his favor. In its supplemental opinion, the court of appeals correctly rejected that argument. This Court has never held that the Secretary's reasonable construction of a statute he is entrusted to administer should be disregarded whenever the statute is ambiguous and the agency has declined to adopt the most pro-veteran construction possible. Under well-established principles of administrative law, an agency's interpretation of the statute it is entrusted to administer is entitled to deference so long as it is reasonable. See, *e.g.*, *Chevron U.S.A. Inc.* v. *NRDC*,

467 U.S. 837, 843 (1984). The canon that statutory ambiguities should be resolved in the veteran's favor comes into play only *after* the court has used all interpretive tools at its disposal, which of course include principles of *Chevron* deference. See *Sears* v. *Principi*, 349 F.3d 1326, 1331-1332 (Fed. Cir. 2003) (disagreeing with the claimant's contention that an "ambiguity must always be resolved in favor of the veteran because the pro-claimant policy underlying the veterans' benefits scheme overrides *Chevron* deference"); *Terry* v. *Principi*, 340 F.3d 1378, 1384 (Fed. Cir. 2003) (similar). Acceptance of petitioner's argument would largely eviscerate the VA's authority to apply its expertise and policy judgment to fill in gaps in the statutory scheme.

Petitioner's reliance (Pet. 27-28) on *Brown* v. *Gardner*, 513 U.S. 115 (1994), and *King* v. *St. Vincent's Hospital*, 502 U.S. 215 (1991), is misplaced. In *Brown*, this Court struck down, as inconsistent with the controlling statute, a regulation that required a claimant for certain veterans' benefits to prove that his disability resulted from negligent treatment by the VA or an accident during treatment. 513 U.S. at 116-118. The Court did not find any ambiguity in the statute, *id.* at 120; instead, it determined that the statute's plain language did not "carry with it any suggestion of fault attributable to the VA," *id.* at 118. The Court noted the canon that interpretive doubt should be resolved in favor of veterans, *id.* at 118, but it did not use that canon to resolve the case, let alone hold that the canon could trump principles of *Chevron* deference.

This Court's decision in *King* is similar. In that case, which concerned the length of military service after which a member of the Armed Forces retains a right to civilian re-employment under 38 U.S.C. 2024(d), the

Court likewise determined that the statutory language was unambiguous. 502 U.S. at 519-522. The Court mentioned the pro-veteran canon at issue in passing, but it did not use the canon to resolve the case, and it did not consider any regulatory interpretation offered by the Secretary. The decision below therefore does not conflict with this Court's decisions in *Brown* and *King*.

In any event, this case would not be an appropriate one in which to resolve any uncertainty regarding the interaction between principles of *Chevron* deference and the canon that statutory ambiguities be interpreted in favor of veterans. As the court of appeals explained (Pet. App. 68a-69a), it is not clear that the canon petitioner invokes would require that his reading of the statute be adopted, because the Secretary already has interpreted the statute in veterans' favor by applying the presumption to any veteran who set foot on the land mass of Vietnam, however briefly.[3] The pro-veteran

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[3] Petitioner contends (Pet. 28 n.8) that the agency's interpretation is the most restrictive construction the statute permits, but that is plainly not the case. The agency has interpreted the statutory term "service in the Republic of Vietnam" to include service involving incidental visits to the Vietnamese land mass (*e.g.*, for a stopover to change planes or for a scheduled "rest and relaxation" tour). The agency's interpretation has included inland waterways, see, *e.g.*, 66 Fed. Reg. at 23,166; 69 Fed. Reg. at 44,620; 73 Fed. Reg. at 20,568, although the VA could reasonably have confined the presumption to the land mass alone. Moreover, the pro-veteran canon surely should not be taken so far as to require an interpretation that is arguably consistent with the statutory text but is inconsistent with the statute's rationale. Under the Agent Orange Act, certain diseases are presumed to be service connected because those diseases are linked to herbicide exposure and the Department of Defense did not accurately track the specific locations where herbicides were sprayed. That rationale does not apply to veterans who served exclusively in areas where herbicides were not sprayed. See pp. 17-19 & note 4, *infra*.

canon does not require a "pro-claimant outcome in every imaginable case." *Sears*, 349 F.3d at 1331-1332; see *ibid.* (regulation that "[i]n the vast majority of cases * * * provides veterans complete relief" is "generally consistent with the pro-claimant policy suffusing the statute" and need not also be interpreted to permit every possible claim).

3. Having determined that the statute is ambiguous, the court of appeals correctly deferred to the Secretary's interpretation. The court first observed that the Secretary's regulation, which speaks of "duty or visitation," 38 C.F.R. 3.307(a)(6)(iii), although "probably" most naturally read as the government suggested, did not "resolve the issue with certainty." Pet. App. 33a. The court therefore applied the established rule that the Secretary's interpretation of the agency's own rule is controlling unless it is "plainly erroneous or inconsistent with the regulation[]." *Id.* at 32a-33a. As the court explained, the Secretary has taken the same position for at least a decade, and that position is consistent with both the text and purposes of the statute. *Id.* at 32a-51a.

Petitioner contends (Pet. 30) that the agency's interpretation was not entitled to *Chevron* deference because it was not embodied in the regulation itself but instead was set forth in other informal agency pronouncements. But whenever an agency regulation is ambiguous, it is necessarily because the agency's clarifying gloss is not embodied in the rule itself. See Pet. App. 34a-35a. This Court has made clear that an agency's interpretation of its own rule is entitled to substantial deference, see, *e.g.*, *Auer* v. *Robbins*, 519 U.S. 452 (1997), and *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and it has not imposed the self-defeating limitation that petitioner suggests.

4. In establishing a statutory presumption of service connectedness for certain diseases linked to Agent Orange, Congress evidently sought to define a class of veterans who served in an area where exposure to herbicides was likely. The title of the enacting legislation ("The Agent Orange Act"), the title of the codified section ("Presumptions of service connection for diseases associated with exposure to certain herbicide agent, presumption of exposure for veterans who served in the Republic of Vietnam"), and the discussion of the statute's purpose in the legislative history all concerned herbicide exposure. See 137 Cong. Rec. 2491-2492 (1991) (statement of Sen. Biden); *id.* at 2492 (statement of Sen. McCain); *id.* at 2494 (statement of Sen. Bradley). Agent Orange was used as a defoliation agent on vegetation on land; it was not used at sea. *E.g.*, Pet. App. 46a-48a, 121a. Absent any sound reason to believe that veterans who served in the waters off Vietnam were likely to be exposed to Agent Orange, the rationale for treating such veterans' diseases as presumptively service connected does not apply.

Contrary to petitioner's suggestion, the effect of the VA's approach is not to "rule out" (Pet. 31) veterans who served in Vietnamese waters as potential victims of herbicide exposure. Veterans in petitioner's position are not barred from obtaining benefits or otherwise subject to disfavored treatment, but are simply required to establish that their disabilities are service connected under the same rules that apply to disabled veterans generally. See Pet. App. 48a. Although individual veterans may have been exposed to herbicides while serving offshore and may have developed the specified diseases as a result, the Secretary permissibly limited the *presumption* of service connectedness to those who are most

likely to have come into contact with Agent Orange. *Id.* at 46a-48a.[4] By providing that certain diseases would be presumed to be service connected when developed by veterans who "served in the Republic of Vietnam," 38 U.S.C. 1116(a)(1)(A), without defining that term further, Congress left to the Secretary the task of further identifying the class of veterans to whom the statutory presumption applies. The court of appeals correctly declined to second-guess the agency's judgment on that question.

Petitioner also argues (Pet. 31) that the Secretary's interpretation is unreasonable because it is not supported by sufficient scientific evidence. That is incorrect. The vast majority of—if not all—herbicides that were used as defoliants in Vietnam were sprayed over land. *E.g.*, Pet. App. 100a, 121a, 132a. In any event, insofar as such empirical judgments bear on the identification of the class of veterans who "served in the Republic of Vietnam," those judgments are primarily entrusted to the responsible agency rather than to the courts.

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[4] Petitioner asserts that the ship on which he served passed "within 100 feet of the coast of Vietnam," and that clouds of defoliants sprayed on coastal forests "drifted out over the water" and "engulf[ed]" his ship. Pet. 15-16; see note 1, *supra*. Evidence of such exposure would be relevant to the determination whether petitioner had established that his disability is service connected. Petitioner does not suggest, however, that the statutory term "served in the Republic of Vietnam" could plausibly be construed in a way that would encompass his own service yet exclude service at the outer reaches of Vietnam's territorial seas. See Pet. App. 51a (court of appeals observes that "[a] standard such as 'near the shore' is unmanageably vague, not to mention its lack of mooring in the statutory or regulatory language").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE
Supreme Court of the United States

JONATHAN L. HAAS,
Petitioner,

v.

JAMES B. PEAKE, M.D., Secretary of Veterans Affairs,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF

When adjudicating a claim for disability benefits, the Department of Veterans Affairs is required by statute to find service connection for specified diseases "manifest . . . in a veteran who, during active military, *naval*, or air service, *served in the Republic of Vietnam* during the period beginning on January 9, 1962 and ending on May 7, 1975." 38 U.S.C. § 1116(a)(1)(A) (emphasis added). Of the three diseases originally specified by the Agent Orange Act of 1991, one – non-Hodgkins lymphoma (NHL) – was included based on a finding of excess risk for that disease among blue-water navy veterans who served

off the coast of Vietnam. Pet. 8-11. From the inception of the Act, the Department gave the Act its plain meaning: if a veteran could prove that he performed military, naval or air service in the Republic of Vietnam in 1962 to 1975, any specified disease was deemed service-connected.

Faced with mounting claims as Congress added common diseases like Type 2 diabetes and lung and throat cancer to the list of covered diseases, Pet. 13-14, Pet. App. 162a-163a, the Department has switched course. It has now pronounced that when Congress granted service connection to veterans who served "in the Republic of Vietnam," it meant served in only *part* of the territory of that sovereign nation: its land mass and inland waterways. Pet. 11. Thus the Department imputes to Congress the intent to exclude from statutory protection the blue-water navy veterans who had the highest risk of the covered disease NHL, notwithstanding express legislative statements of the Act's sponsors that Congress intended to codify the NHL regulation granting them service connection, Pet. 11, and notwithstanding the widely recognized phenomenon of extensive wind drift of the chemical from the heavily sprayed coasts of Vietnam. Pet. 32.

In its brief in opposition, the Department offers no plausible defense of its unreasonable interpretation. It cannot make the requisite showing that "Republic of Vietnam" in ordinary meaning ever refers only to the perimeter of its land mass, a prerequisite to its assertion of statutory ambiguity. The Department

further ignores (and thus by its silence concedes) Petitioner's argument that its interpretation is inconsistent with the usage of the same term both in other parts of section 1116 and in the neighboring provisions of the Act. Pet. 23-25. Nor can it reconcile the Federal Circuit's failure to apply the pro-veteran canon with this Court's precedent, which declares that *Chevron* deference only comes into play "*after* applying the rule that interpretive doubt is resolved in favor of the veteran." *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (emphasis added); Pet. 27-29.

The Department does not deny that the categorical exclusion of the approximately 832,000 blue-water navy veterans from the Act's protections is a matter of supreme importance to the nation's Vietnam veterans. Pet. 17-18. It does not contend that there is any vehicle problem with this case. Nor does the Department contest that if this petition is denied, many pending claims will be denied and irretrievably lost. Pet. 32-33. Indeed, a stay on the Department's denial of blue-water navy claims entered by the Court of Appeals for Veterans Claims recently expired. *Ribaudo v. Nicholson,* No. 06-2762, 2008 U.S. App. Vet. Claims LEXIS 1410 (Nov. 17, 20008). This Court should grant the petition to ensure fidelity to the intent of Congress and to this Court's precedents on this critical question.

1. The Department cannot escape the rule that an *undefined* statutory term – such as "Republic of Vietnam" – is intended to have its ordinary meaning. *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187

(1995). The ordinary meaning of a territorial reference to a sovereign nation necessarily encompasses that nation's territorial seas. Pet. 17-18. None of the Department's counterarguments is sound.

First, the Department asserts that "[t]he territory under a nation's jurisdiction may *include* the nation's land mass ..." Opp. 10 (emphasis added). Indisputably, the land mass of a nation is always included within its territorial jurisdiction, and – if the nation is landlocked – its land boundaries define its borders. But there is not a single authority that would support *limiting* the territory of a *coastal* nation – such as the Republic of Vietnam – to its land mass, and excluding the territorial seas. *Restatement (Second) of Foreign Relations Law* § 11 (1965) ("*Restatement*") (emphasis added); Pet. 18-19. To find ambiguity, there must be at a minimum "two plausible interpretations" of the statutory language in question. *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 419 (2005). No plausible interpretation of "Republic of Vietnam" limits that undefined term to the perimeter of its land mass.

Second, citing a treatise on the law of the sea governing marine resources, the Department contends that a nation's jurisdiction may in some circumstances extend beyond the territorial seas to include "the contiguous zone, continental shelf, and exclusive economic zone." Opp. 10. But "[a]mbiguity is a creature not of definitional possibilities but of

statutory context." *Brown*, 513 U.S. at 118. The Agent Orange Act has nothing to do with sovereignty over seabed resources, and Congress cannot plausibly have intended the term "Republic of Vietnam" to refer to a 200-mile exclusive economic zone around that country. Rather, that term identifies the territory in which the member had to be physically present during active service, and there is no ambiguity as to whether a naval veteran who served in the territorial seas of Vietnam performed "naval service" in the "Republic of Vietnam." Regardless, even if any of those concepts were plausible interpretations of the statutory term, they all include the territorial seas, and thus would not support the Department's position. Pet. 20-21.

Third, the Department points to statutes where Congress has extended benefits to veterans who served in waters "adjacent to" Vietnam or Mexico. Opp. 11. But "adjacent" waters is a term of art far broader than territorial seas, encompassing the entire theater of naval operations; in the Vietnam context, it has been defined to extend more than 100 miles offshore. Pet. 22-23. Congress's decision not to broaden coverage of the Act to include waters adjacent to the Republic of Vietnam does not divest the statute of its plain meaning as encompassing naval service within that nation's territory.

Fourth, the Department states baldly that "[t]here are a number of definitions, discussed in detail by the courts below, that define a nation's boundaries without respect to its territorial seas." Opp. 12. But

the Government fails to answer Petitioner's showing that none of the other sources cited by the courts below stands for that proposition. Pet. 11-13.

Finally, unable to make the requisite showing that the term "Republic of Vietnam" in its ordinary sense ever means only the land mass and inland waterways, the Department attempts to draw support from the specialized and inapposite context of immigration law. But even those arguments do not withstand scrutiny. The immigration statutes do not reflect idiosyncratic conceptions of what constitutes the territory of the "United States." Rather, they reflect longstanding interpretations whereby immigration rights that accrue to persons "within the United States" are not defined by territorial presence. *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 175 (1993); *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). Ignoring this distinction, the Department attempts to muster support from a Legal Counsel Opinion that aliens interdicted in territorial waters are not entitled to an exclusion hearing under the Immigration and Nationality Act (INA). Opp. 11-12. But the Legal Counsel "base[d] this conclusion primarily on the examination of the text of the statute – most importantly, its explicit requirements for exclusion proceedings" in INA sections 235 and 236. *Immigration Consequences of Undocumented Aliens' Arrival in United States Territorial Waters*, 17 U.S. Op. Off. Legal Counsel 77, 79 (1993). The opinion simply found that nothing in the INA's definition of "United States," which does not

expressly mention the territorial seas, "compels" a different construction of those provisions. *Id.*

Notably, the Department does not go so far as to contend that the term "United States" in the INA excludes the territorial waters. For example, the INS has interpreted the statutory grant of board-and-search powers to INS agents when "a reasonable distance from any external boundary of the United States," 8 U.S.C. § 1357(a)(3), to mean a reasonable distance from the limits of the territorial seas, 8 C.F.R. § 287.1(a)(1), and other provisions of the INA would make no sense if they did not apply to United States territorial waters. *See, e.g.*, 8 U.S.C. §§ 1284 (rules for retention of alien crewmen), 1323 (liability of vessels and their masters for bringing aliens into the United States).

2. Statutes are to be interpreted as a whole, not as isolated phrases. *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). The Department's construction is not only untenable as an interpretation of "Republic of Vietnam," but it is also irreconcilable with usage of the same term in other parts of section 1116, and in other sections of the 1991 Act. Pet. 23-25. If the Department's construction holds sway, Congress has required a veteran to prove the last day he actually set foot on the landmass of Vietnam to prove that his chloracne or porphyria cutanea tarda was timely manifested. *See* 38 U.S.C. § 1116(a)(2)(C),(E). The Department does not suggest that it ever required such proof, much less that Congress would reasonably have intended it. Nor

does the Department attempt to square its "boots-on-land" interpretation of section 1116 (originally section 2 of the Agent Orange Act of 1991, Pet. App. 138a-139a) with sections 3, 6, 7, and 8 of the Act (*id.* at 143a-155a). As the petition demonstrates, Congress used "service in the Republic of Vietnam" in its ordinary sense, not in the contorted sense the Department forwards here. Pet. 23a-24a. The Department's avoidance of these necessary steps of statutory interpretation betrays the poverty of its position.

3. The Department fares no better in addressing the legislative history. The Department urges that Congress engaged in a "close reading" of the two existing Dioxin Act regulations (chloracne and NHL); found that the former had a drastically narrower definition of the term service in Vietnam than the latter based on the placement of a comma; and codified the narrower version. Opp. 13-14.[1] Petitioner has demonstrated the error of that analysis, Pet. 25-27, but most fundamentally the Department's account is contradicted by the express declarations of the Act's sponsors that they were codifying both regulations (which are substantively identical despite the minor variance in punctuation). *Id.* at 11. The Department once again offers no explanation why Congress (acting in solicitude for

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[1] The Department incorrectly implies that the "duty or visitation" language adopted by regulation after the 1991 Act appeared only in the original Rule 311 (the chloracne regulation). Opp. 14. It also appeared in Rule 313 (the NHL regulation) as well. Pet. 8-9.

veterans) would eliminate for blue-water navy veterans the presumption of service connection for NHL that they enjoyed under the existing regulation, when that group was at the highest risk of contracting that disease. Congress did no such thing.

Nor does the Department marshal any evidence from the legislative history that Congress ever contemplated a "boots-on-land" requirement. Aerial chemicals are subject to wind drift. *See* Heping Zhu *et al.*, *DRIFTSIM: Predicting Drift Distances of Spray Droplets*, Ohio St. Univ. Extension, Bulletin 923 at 1-2, *available at* http://ohioline.osu.edu/b923/pdf/b923.pdf (last accessed Dec. 28, 2008). Agent Orange was blown far offshore by the heavy monsoonal winds that blow half the year. ROA560. Even the narrower service-connection rule proposed as an alternative by Admiral Zumwalt would have awarded service connection to anyone within twenty miles of a spray site – including naval veterans who served in the three-mile territorial seas off the heavily sprayed coasts. Pet. 32. But Congress rejected all such limitations in opting for a more inclusive remedy; it certainly did not categorically exclude blue-water navy veterans from the Act's protections.

4. Even if the statutory meaning were not so clear as it is, the question should have been resolved by application of the pro-veteran *Brown* rule.[2] The Department disagrees, favoring the rule adopted by

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[2] The Department apparently agrees with petitioner that this issue is properly presented to the Court. *See* Pet. 28-30.

the Federal Circuit below that "the canon that statutory ambiguities should be resolved in the veteran's favor comes into play only *after* the court has used all interpretive tools at its disposal, which of course includes principles of *Chevron* deference." Opp. 15. But that directly contradicts the rule announced by this Court in *Brown* that *Chevron* deference is granted only "*after* applying the rule that interpretive doubt is resolved in favor of the veteran." *Brown*, 513 U.S. at 118 (emphasis added]. The Department is correct that *Brown* found the statutory language at issue to be plain. Opp. 15. But the important point for certiorari purposes is that the Federal Circuit's rule runs directly afoul the rule stated by this Court.

Moreover, the Federal Circuit's rule is unsound. Congress is presumed to legislate with the understanding that any ambiguity will be interpreted in the veteran's favor. *King*, 502 U.S. at 220-21 n.9. This is a substantive rule of veteran's law, and agency deference only comes into play after "employing traditional tools of statutory construction." *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 n.9 (1984). Indeed, *Chevron* deference is simply a general presumption of congressional intent when Congress delegates rulemaking authority to agencies, *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740-41 (1996), and it is sensibly invoked only after canons specific to veterans law are applied.

The Department objects that fidelity to *Brown* "would largely eviscerate the VA's authority to apply its expertise and policy judgment to fill in gaps in the statutory scheme." Opp. 15. That is untrue; under the "modified" *Chevron* rule that formerly prevailed in the Federal Circuit, the *Brown* rule was employed on pure questions of statutory interpretation (interpretive rules), and the agency was granted deference on gap-filling substantive rules. Pet. 28. By contrast, the new Federal Circuit rule wholly eliminates the *Brown* rule whenever the Department has addressed the issue in a regulation, adjudication, or other ruling with the force of law (which are effectively the only Departmental orders that come before the Federal Circuit in its limited jurisdiction, *see* 38 U.S.C. § 7292). Veterans statutes are supposed to be interpreted in favor of veterans out of gratitude to those "who left private life to serve their country in its hour of great need." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946). Congress did not elevate principles of agency expertise over solicitude for disabled veterans.

The Department renews the Federal Circuit's remarkable claim that in any event "the Secretary already has interpreted the statute in the veterans' favor by applying the presumption to any veteran who set foot on the land mass of Vietnam, however briefly," and to those who traversed inland waterways. Opp. 16 & n.3. The Department confuses two discrete issues: whether Congress could have drawn a narrower standard, and whether the

statutory phrase "veteran who, during active military, naval, or air service, served in the Republic of Vietnam," 38 U.S.C. § 1116(a)(1)(A), is susceptible to a narrower interpretation than the Department gave. Only the latter is relevant. The Department cannot claim that it favored veterans by not imposing duration-based limits on service, because the statute does not authorize any such restriction. And even the Department does not contend that the territorial term "Republic of Vietnam" can be interpreted to exclude inland waters. It is impossible to construe section 1116 more narrowly than the Department did.

The relationship of *Brown* and *Chevron* is a critical issue that affects all veterans benefits cases. The importance of this conflict, together with the inherent importance of the coverage of the Agent Orange Act, makes this Court's review imperative.

5. Finally, the Department misapprehends petitioner's argument on the unreasonableness of its interpretation. The interpretation of whether a veteran "served in the Republic of Vietnam" from 1962 to 1975 is a question of historical fact, and does not depend on the Department's evaluation of current scientific evidence. Moreover, the Department is not drawing its categorical lines based on scientific evidence establishing relative levels of exposure or disease rates among those who served in coastal waters or on land. It is simply *presuming* that those who served at sea had materially different exposure, despite plausible channels of indirect exposure through spray drift and water contamination.

Pet. 7 & n.1. But Congress chose not to draw any lines whatsoever among Vietnam veterans, precisely because evidence of exposure and causation was practically unavailable (which is why the Department's contention that blue-water navy veterans should be put to that proof is no answer at all). Congress believed that full coverage was a better course than excluding exposed veterans who could not prove service connection.

CONCLUSION

The Department and the Federal Circuit have decided a question of critical importance to the nation's veterans in conflict with the principles that this Court has declared applicable to veterans cases. For the reasons stated above and in the petition, this Court should grant review.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF THE AMERICAN LEGION, MILITARY ORDER OF THE PURPLE HEART, AND UNITED SPINAL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE AMERICAN LEGION, MILITARY ORDER OF THE PURPLE HEART, AND UNITED SPINAL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

Amici curiae have a vital interest in the resolution of the question presented in this case.[1]

[1] The parties have consented to the filing of this amicus brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

Amicus curiae The American Legion is a not-for-profit veterans service organization that, among other things, helps war-time veterans and their families. Among its several million members are many veterans who served in the territorial waters of the Republic of Vietnam during the Vietnam era.

Amicus curiae Military Order of the Purple Heart is a not-for-profit organization of combat-wounded veterans that serves all veterans and their families. Its members likewise include many who served in the territorial waters of the Republic of Vietnam during the Vietnam era.

Amicus curiae United Spinal Association is a not-for-profit membership organization founded by paralyzed veterans. Its mission is to improve the quality of life for all Americans, including veterans, who have spinal cord injuries and disorders.

These organizations ("Amici") also provide advocates who represent many claimants for benefits before the Department of Veterans Affairs ("DVA"). By virtue of their missions, Amici have an interest in ensuring that those who serve the United States in time of war receive in a fair and expeditious manner the disability benefits to which Congress has entitled them. This includes ensuring proper application of the presumptions established by Congress in the Agent Orange Act of 1991 to Vietnam veterans who are situated similarly to the claimant here.

This Court's review is necessary to prevent the systematic application of a defective framework for construing veterans benefits statutes. If followed, the approach of the United States Court of Appeals for the Federal Circuit will permit the erosion of important benefits that Congress has conferred upon

veterans. Amici have a strong interest in preserving these benefits for veterans in need. Amici therefore urge this Court to grant the petition for certiorari.

SUMMARY OF ARGUMENT

The petition for certiorari should be granted because the Federal Circuit's decision frustrates the will of Congress by wrongly deciding important legal questions with significant practical consequences. Congress intended to compensate blue-water Navy veterans for Agent-Orange-related disabilities to the same extent as other veterans who served in the Republic of Vietnam during the Vietnam era. The Federal Circuit's frustration of this intent is based on its adoption of an incorrect legal framework for construing veterans benefits statutes.

Application of that framework in this case already portends the denial of important disability benefits to a large class of veterans whom Congress intended to compensate. If allowed to stand, the continued application of this mistaken framework threatens to erode other benefits that Congress has conferred upon this Nation's service veterans.

Amici support each of the grounds for review advanced by Commander Haas in his petition. This amicus brief focuses on the legal and practical significance of two of the Federal Circuit's errors. The first error is the Federal Circuit's departure from the "plain meaning" canon of statutory construction. The second error is the Federal Circuit's award of priority to *Chevron* deference over the pro-veteran canon of statutory construction required by this Court's precedent.

ARGUMENT

A. This Court Should Grant Review to Ensure Conformity to the "Plain Meaning" Canon in Interpreting Veterans Benefits Statutes.

The Federal Circuit held that naval veterans who served only in the territorial waters of the Republic of Vietnam did not "serve[ ] in the Republic of Vietnam" within the meaning of 38 U.S.C. § 1116(a)(1)(A). The threshold step in the Federal Circuit's analysis was its ruling that "served in the Republic of Vietnam" is ambiguous. The Federal Circuit arrived at this conclusion by identifying several conceivable interpretations that would exclude the service of blue-water Vietnam veterans. *See* Pet. at 18-27.

The Federal Circuit's methodology in concluding the statutory term is ambiguous contravenes this Court's precedent. This Court has held that "[a]mbiguity is a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994); *see also Moskal v. United States*, 498 U.S. 103, 108 (1990) ("Because the meaning of language is inherently contextual, we have declined to deem a statute 'ambiguous' for purposes of lenity merely because it was *possible* to articulate a construction more narrow than that urged by the Government."). Accordingly, the context of the statute must be considered in determining whether a statutory term has a plain meaning and, if so, what that plain meaning is. *See also King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) ("[T]he meaning of statutory language, plain or not, depends on context.").

Here, the Federal Circuit found ambiguity based on its conception of the definitional possibilities largely

unmoored from the statutory purpose and history. *See* Pet. at 18-27. This is precisely the kind of approach to statutory construction that this Court has held improper. *See, e.g.*, *Brown*, 513 U.S. at 118; *King*, 502 U.S. at 221; *Moskal*, 498 U.S. at 108. And once the statutory context is properly accounted for, the meaning of "served in the Republic of Vietnam" is clear. *See* Pet. at 18-27.

If left intact, the Federal Circuit's approach to statutory interpretation in this case will give the DVA wide latitude to narrow improperly the scope of veterans benefits statutes. If ambiguity can be found so readily in a statutory term whose meaning is clear in context, and a restrictive agency interpretation is then given *Chevron* deference, it will be easy to thwart Congress's intent to confer benefits more broadly than the agency is inclined to recognize.

B. This Court Should Grant Review to Ensure Conformity to the Pro-Veteran Canon in Interpreting Veterans Benefits Statutes.

After finding ambiguity where none exists, the Federal Circuit compounded its error by applying *Chevron* deference over the pro-veteran canon of statutory construction. *See* Pet. at 27-30. This canon requires the resolution of interpretive ambiguities in veterans benefits statutes in favor of the veteran. *Brown*, 513 U.S. at 118. It is not merely a tie-breaking principle of last resort. Rather, Congress is presumed to legislate against the backdrop of this principle, *King*, 502 U.S. at 220-21 n.9, to assist "those who left private life to serve their country in its hour of great need," *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

The pro-veteran canon thus gives effect to Congress's intent. Consequently, *Chevron* itself demands application of this canon ahead of any deference to the agency's interpretation. That is because *Chevron* deference comes into play only when Congress's intent is unclear, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984), and the pro-veteran canon serves to clarify Congress's intent when the scope of a veterans benefits statute is called into question, *King*, 502 U.S. at 220-21 n.9.

The Federal Circuit previously recognized the need to prioritize the pro-veteran canon over *Chevron* deference. *See* Pet. at 28. A plurality of the *en banc* court recently reinforced the point. *See Kirkendall v. Department of Army*, 479 F.3d 830, 846 (Fed. Cir. 2007). In *Kirkendall*, the plurality observed that the Uniformed Services Employment and Reemployment Rights Act "emphatically does not admit of deference to the [Merit Systems Protection Board] à la *Chevron* because '[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.'" 479 F.3d at 846 (quoting *Chevron*, 467 U.S. at 843 n.9) (second alteration in original). The plurality concluded that "[a]fter applying the [pro-veteran canon], it is abundantly clear that Congress' intent is to provide veterans a hearing upon request, especially because we 'presume congressional understanding of such interpretive principles,' at the time of enactment." *Id.* at 846 (quoting *King*, 502 U.S. at 220-21 n.9).

The Federal Circuit now has given conflicting guidance on the interplay of the pro-veteran canon and

Chevron. And the Federal Circuit declined to resolve the conflict *en banc* in this case. Both the pro-veteran canon and the *Chevron* framework were established by this Court's precedent. And the Federal Circuit has exclusive Court of Appeals jurisdiction with respect to the questions at hand. *See* 38 U.S.C. § 7292(c) (vesting in the Federal Circuit "exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof" in cases involving review of a decision of the United States Court of Appeals for Veterans Claims). As a result, this Court's intervention is warranted now.[2]

The pro-veteran canon recognizes the "strongly and uniquely pro-claimant" character of veterans benefits statutes. *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998). The Federal Circuit's framework for statutory interpretation in this case undermines this character of the statutes. The Federal Circuit bypassed the pro-veteran canon to apply an unalloyed *Chevron* analysis. In doing so, the Federal Circuit has authorized the DVA to thwart Congress's intent to compensate veterans to the full extent of its legislation. The decision allows the DVA instead to construe ambiguous veterans benefits statutes parsimoniously subject only to *Chevron* reasonableness review. Immediate review is warranted to repair the Federal Circuit's defective framework before it

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[2] The Court of Appeals for Veterans Claims also has recognized the need for this Court's guidance on this issue. *See DeBeaord v. Principi*, 18 Vet. App. 357, 368 (2004) (discussing possible tension between pro-veteran canon and *Chevron* and noting that "guidance from the Supreme Court would appear necessary to resolve this matter definitively").

deprives veterans of badly-needed, legislatively-intended benefits here and in other cases.

The consequences of this case for blue-water Vietnam veterans' access to the particular disability benefits at issue are reason enough to grant review. The broader implications of the Federal Circuit's methodology for the interpretation of veterans benefits statutes make review all the more imperative.

CONCLUSION

The petition for certiorari raises questions of great legal and practical importance to those who have served this Nation in its armed forces. The Federal Circuit answered these questions in a manner contrary to this Court's precedent and detrimental to disabled veterans. Amici thus urge this Court to grant the petition.

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